

Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance

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TABLE OF CONTENTS

I. INTRODUCTION	407
II. THE SCA HAS PREVENTED DIGITAL INHERITANCE IN SEVERAL NOTED INSTANCES	408
III. THE STORED COMMUNICATIONS ACT	411
A. <i>History of the Stored Communications Act</i>	411
B. <i>Entities and Individuals Covered by the Stored Communications Act</i>	413
1. <i>Electronic Communication Services</i>	414
2. <i>Remote Computing Services</i>	415
C. <i>Types of Activity That the SCA Prohibits</i>	416
IV. HOW THE SCA COMPOUNDS THE DIGITAL INHERITANCE PROBLEM	417
A. <i>How the SCA Affects Email Privacy Policies</i>	418
B. <i>How the SCA Has Influenced Social Network Privacy Policies</i>	419
C. <i>How the SCA Influences Privacy Policies of Online Gaming Sites and Other Digital Property Websites</i>	421
D. <i>The Exceptions to the SCA Do Not Provide an Out for Digital Inheritance</i>	422
1. <i>Court Orders</i>	423
a. <i>Requiring a Court Order Adds to the Time and Cost of Estate Administration</i>	424
b. <i>The Problem of Time and Account Deletion</i>	425
c. <i>Granting a Court Order Is Not a Satisfactory Solution to the Digital Inheritance Problem</i>	426
2. <i>Consent</i>	427
V. DIGITAL INHERITANCE SHOULD BE ALLOWED	428
A. <i>Allowing Digital Inheritance Preserves Economic Benefits and Future Beneficial Users</i>	429

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1. <i>Current Economic Benefit</i>	429
2. <i>Social Media Has Not Realized Its Future Capabilities and Thus, Its Content Must Be Preserved</i>	430
B. <i>A Coping Mechanism</i>	431
C. <i>An Exploratory and Archival Measure</i>	432
VI. THE SCA SHOULD BE REFORMED TO EXEMPT HEIRS, BENEFICIARIES, AND ESTATE FIDUCIARIES	434
A. <i>How Estates Could Be Exempted Under the Stored Communications Act</i>	434
B. <i>The Model Act: 18 U.S.C. § 2701</i>	435
C. <i>Why Heirs, Beneficiaries, and Estate Fiduciaries Should Be Exempted</i>	435
1. <i>Reforming the SCA Would Ease Liability Concerns for Social Media and Email Providers</i>	435
2. <i>Reforming the SCA Would Remove the Federal Government from an Area of Law Traditionally Relegated to the States</i>	436
3. <i>Reforming the SCA Would Return the Act's Scope to Criminal Investigations and Criminal Conduct</i>	437
D. <i>Issues and Worries over Reforming the SCA</i>	438
1. <i>Reforming the SCA Does Not Unnecessarily Inhibit Social Media Providers' Abilities To Control the Use of Their Products</i>	438
a. <i>Customer Confidence and Privacy</i>	438
2. <i>Amending the SCA Would Not Interfere With Decedents' Rights To Control the Disposition of Their Property at Death</i>	440
a. <i>Decedents' Right To Control Who Has Access to Digital Content</i>	441
i. <i>Beneficiaries and Heirs</i>	442
ii. <i>Estate Fiduciaries</i>	442
E. <i>The SCA's Reformation Is a Necessary, but Not Individually Sufficient, Solution to the Digital Inheritance Problem</i>	443
1. <i>Lack of State Laws in the Area of Digital Inheritance</i>	443
2. <i>How Current State Laws Address Digital Inheritance</i>	443
3. <i>Uniform Laws</i>	444
VII. CONCLUSION.....	445

I. INTRODUCTION

*The Internet [is] the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy that we have ever had.*¹

It is very difficult to regulate and craft legislation to manage a problem that no one fully understands. Nonetheless, the juggernaut that society has come to know as the World Wide Web has come to be managed by a myriad of complex and outdated state, national, and international laws.² Similarly, social media has emerged over the past decade as the largest use of the internet and is also largely not understood.³ Since social media is a subset of the World Wide Web, it too is regulated by the same tangle of state, national, and international laws.⁴ Social media and the internet have created remarkable advances in society that have divided generations—one raised with a mouse in hand and one who has never, and may never, fully grasp the technology's reach. And yet these two generations, separated by the rapid and largely unknown expansion of information and data, must equally confront the digital inheritance problem.

In the realm of inheritance, the intersection of death, cyberspace, and outdated statutes has highlighted one of the many misunderstood issues about the modern internet and social media: what happens to one's social media and email accounts and digital content when she dies? Do heirs have the right to access old Facebook accounts and email accounts? Do they have a right to use them? These questions are complicated by the twist of federal legislation regulating internet privacy, most notably the Stored Communications Act (SCA).⁵ The SCA, a subsection of the Electronic Communications Privacy Act

¹ Staff Writer, *Net Founders Face Java Future*, CNET (Apr. 2, 1997, 5:30 PM), http://news.cnet.com/Net-founders-face-Java-future/2100-1001_3-278526.html (internal quotation marks omitted). Eric Schmidt gave this description of the internet during his last presentation as Chief Technology Officer of Sun Microsystems. *Id.* Eric Schmidt now serves as the Executive Chairman of Google. *See Management Team*, GOOGLE, <http://www.google.com/about/company/facts/management/> (last visited Jan. 15, 2013).

² *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 785–86 (2001).

³ *See* NIELSEN, STATE OF THE MEDIA: THE SOCIAL MEDIA REPORT 2012, at 4 (2012), available at <http://blog.nielsen.com/nielsenwire/social/2012/>. Of the total amount of time people spend in front of a computer, over twenty percent of that time is spent on social media sites. *Id.* Even more astonishing, Facebook accounts for seventeen percent of time spent in front of a PC. *Id.*

⁴ *See* Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information?*, 111 PENN ST. L. REV. 587, 598–604 (2007) (stating that social media websites are regulated by several federal laws, including the Electronic Communications Privacy Act, CAN-SPAM Act, Section 5 of the FTC Act, Fair Credit Reporting Act, and Children's Online Privacy Act). Additionally, social media websites are often subject to international laws such as European Union safe harbor statutes. *Id.* at 601.

⁵ Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2012).

(ECPA),⁶ which originally regulated the interception of electronic communications by federal law enforcement agencies, has encouraged social media and email providers to adopt strict provisions regarding who may access a deceased user's account after death.⁷ Thus, even though the SCA was originally drafted to inhibit illegal wiretaps,⁸ it now stands as a barrier to digital inheritance, a purpose which is outside its original scope and conflicts with traditional state approaches to inheritance.

This Note explores how the statutory scheme of the Stored Communications Act interferes with the transfer of digital assets and content after death. Part II lays out three cases that illustrate the SCA's effect on digital inheritance. Part III examines the history of the SCA and what activity the Act regulates. Part IV explores how the SCA has subsequently influenced the privacy policies of social media and email providers, which prevents heirs, beneficiaries, and estate fiduciaries from accessing the accounts or content of deceased users. Part V explains why allowing digital inheritance is beneficial for society. Finally, Part VI advocates for an amendment to the SCA that would include an exception for parties in digital estates, namely heirs, beneficiaries, and estates fiduciaries, considers implications for such an amendment, and explores how other solutions do not adequately address the issue of SCA interference in digital inheritance.

II. THE SCA HAS PREVENTED DIGITAL INHERITANCE IN SEVERAL NOTED INSTANCES

The problem of digital inheritance and the SCA is a real-world problem, best illustrated by three incidents.⁹

First consider the case of Justin Ellsworth, a United States Marine killed in Iraq in 2004.¹⁰ Lance Corporal Ellsworth left behind a digital estate that

⁶ Electronic Communications Privacy Act, Pub. L. No. 95-108, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

⁷ See *infra* Part V.

⁸ In support of the Electronic Communications Privacy Act, Senator Kennedy noted that the Act would "authorize . . . controlled electronic surveillance . . . by duly authorized law enforcement officials under a Court order procedure for the purpose of investigating specified crimes involving national security and serious offenses." S. REP. NO. 1097, at 214 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2264 (additional views of Mr. Kennedy of Massachusetts, Mr. Tydings, Mr. Smathers, and Mr. Fong).

⁹ The three outlined cases are illustrative cases. The issue of digital estates has rapidly expanded over the past decade and involves at least a dozen prominent cases of SCA interference in digital estates. For more information on other instances of SCA interference, see *infra* Part IV.

¹⁰ Jim Hu, *Yahoo Denies Family Access to Dead Marine's E-mail*, CNET (Dec. 21, 2004, 2:49 PM), http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html. There has been at least one other instance of where the SCA has prevented the family of a soldier killed in the line of duty from accessing the serviceman's email account. In 2005, the website Mailbank.com prevented the family of

included his Yahoo! email address.¹¹ The Marine Corps email policy allows soldiers to send and receive messages on their own personal email accounts, with limited exceptions.¹² However, soldiers on the front line do not have access to email and often resort to commercial email services like Yahoo! or Gmail to correspond with family and keep their affairs back home in order.¹³ When Lance Corporal Ellsworth was killed by a roadside bomb, his family attempted to gain access to his email account and its contents.¹⁴ However, Ellsworth's family was informed that Yahoo's privacy policy, which is influenced by the SCA, prohibited them from accessing his account without a court order.¹⁵ Ellsworth's family eventually filed a complaint in an Oakland County, Michigan court, seeking a court order requiring Yahoo! to release the account's contents.¹⁶ The court granted the request and ordered Yahoo! to turn Lance Corporal Ellsworth's account over to his family.¹⁷ Yahoo! complied with the order by placing all of Ellsworth's account content on a compact disc that was mailed to the family.¹⁸ However, the compact disc that Lance Corporal Ellsworth's family received only contained emails that he received.¹⁹ The disc did not contain any of the messages that the Marine had composed or sent.²⁰

Second, consider the case of Alison Atkins, whose family tried to gain access to her Facebook, Twitter, and Tumblr accounts to preserve her quickly

Karl Linn, a Marine Corps reservist killed in Iraq in 2005, from accessing his email account after his death. See Ariana Eunjung Cha, *After Death, a Struggle for Their Digital Memories*, WASH. POST, Feb. 3, 2005, at A1, A17.

¹¹ See Hu, *supra* note 10. Lance Corporal Ellsworth's family sought access to their son's account in order to "keep[] [his] e-mails for his brothers and sisters, to make sure that they have an accurate account of just who their brother was." *The Abrams Report* (MSNBC television broadcast Dec. 21, 2004) (transcript available at <http://www.nbcnews.com/id/6746179/#.UsmeY2RDvIY>).

¹² U.S. Dep't of the Navy, Acceptable Use Policy for Department of the Navy (DON) Information Technology (IT) Resources §§ 5D–E, <http://www.doncio.navy.mil/uploads/1004RVC76747.pdf>. "[Navy] IT resources are provided for official use and authorized purposes only." *Id.* The policy states that employees' and soldiers' use of business emails "must not adversely affect the performance of official duties." *Id.*

¹³ See Hu, *supra* note 10. When soldiers are on the front lines, they generally do not have access to DON computers and must rely on commercial email addresses to communicate back home as a result. See *id.*

¹⁴ Marney Rich Keenan, *Soldiers' Words Span Continents, Centuries To Link Families' Hearts*, DETROIT NEWS, Dec. 29, 2004, at B1, B3; see also Hu, *supra* note 10.

¹⁵ Jeffrey Zaslow, *Letters from the Front: Efforts Mount To Preserve Soldiers' Correspondence*, WALL ST. J., May 5, 2005, at D1.

¹⁶ *Id.*; see also Jennifer Chambers, *They Win Right To See Late Son's Messages*, DETROIT NEWS, Apr. 21, 2005, at A1.

¹⁷ Paul Sancya, *Yahoo Will Give Family Slain Marine's E-mail Account*, USA TODAY (Apr. 21, 2005, 12:49 PM), http://usatoday30.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA.

¹⁸ Chambers, *supra* note 16.

¹⁹ *Id.*

²⁰ *Id.*

fading memory.²¹ Alison died of a colon disease in July 2012, leaving behind a myriad of different social media accounts.²² Alison's sister was able to gain access to some of her accounts after breaking the password on her sister's laptop computer.²³ The family found photographs, communications, poems, and other content on Alison's social media accounts, including Facebook.²⁴ Facebook eventually discovered Alison's death and switched the password and the account disappeared entirely after the password was changed.²⁵ The family requested that Facebook give them access to the account—Facebook refused.²⁶

Lastly, consider two cases that involve online videogame players. Jerald Spangenberg was an avid World of Warcraft player who died suddenly of an abdominal aneurysm.²⁷ Nathan Vogel was also an avid online game player who died of an epileptic seizure at the age of thirteen.²⁸ When Jerald's daughter and Nathan's step-father attempted to access their online gaming accounts in order to inform their respective gaming communities about each user's death, they were denied access to the accounts by the game publishers.²⁹

These three cases illustrate one common thread: in each of these instances, families and heirs were denied access to social media accounts because of privacy policies that were heavily influenced by the Stored Communications Act, a subsection of the Electronic Communications Privacy Act. Moreover, these cases illustrate implications beyond prohibited access. Lance Corporal Ellsworth's case demonstrates how the SCA constrains estates from preserving digital content and how the Act inhibits the orderly administration of estates,

²¹ See Geoffrey A. Fowler, *Life and Death Online: Who Controls a Digital Legacy?*, WALL ST. J., Jan. 5–6, 2013, at A1.

²² *Id.* Alison had a myriad of different social media accounts, including Facebook, Twitter, Tumblr, Yahoo! and Hotmail. *Id.*

²³ *Id.* Guessing passwords is not a fool-proof plan. In some instances, if the wrong password is guessed too many times, the accounts will reset themselves, which requires a user to access their email to reset the account. *See id.*

²⁴ *Id.*

²⁵ *Id.* Facebook has changed the password of other accounts after it has discovered family members attempting to access a deceased user's account. *See* Alison Smith Squire, *Facebook Banned Me from My Dead Daughter's Page . . . To Protect Her Privacy: Mother's Anguish After Teenager Dies of Brain Tumour*, U.K. DAILY MAIL (Mar. 4, 2012, 2:16 PM), <http://www.dailymail.co.uk/news/article-2110019/Facebook-banned-dead-daughters-page-Mothers-anguish-locked-brain-tumour-teenagers-site-web-giant.html#axzz2K9tixSsV>.

²⁶ Fowler, *supra* note 21, at A12. After writing Facebook and validating Alison's death, Facebook eventually restored the account in memorial status, which has restricted content. *Id.*

²⁷ Peter Svensson, *Death Leaves Online Lives in Limbo*, USA TODAY (Mar. 16, 2009, 10:47 AM), http://usatoday30.usatoday.com/tech/news/2009-03-16-death-online_N.htm.

²⁸ *Id.*

²⁹ *Id.* World of Warcraft's privacy policy "does not recognize the transfer of World of Warcraft Accounts or BNET Accounts." *World of Warcraft Terms of Use*, BLIZZARD ENT., http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Aug. 22, 2012). Thus, the accounts cannot be accessed or used by others after the death of the owner.

including a family's ability to access the decedent's digital accounts to close out the decedent's affairs. Alison Atkins's case illustrates how the SCA can interfere with a family's attempt to remember, memorialize, and explore the life of a lost loved one. Jerald Spangenberg and Nathan Vogel's cases illustrate some of the problems that come from the less-thought-of realms of digital inheritance, where digital property, some of which has real economic value, cannot be transferred to heirs and beneficiaries.

III. THE STORED COMMUNICATIONS ACT

The root of the problem regarding digital inheritance and privacy policies for social media and email providers is that the Stored Communications Act is misunderstood. Thus, to begin, it is important to describe the SCA, and how the Act has been interpreted and applied.

A. History of the Stored Communications Act

The SCA, which is a subsection of the Electronic Communications Privacy Act,³⁰ is a descendant of Congress's desire to control the federal government's interception of electronic communications while conducting criminal investigations.³¹ The issue of governmental interception of electronic communications first came about in 1928 when the United States Supreme Court decided *Olmstead v. United States*.³² The *Olmstead* Court upheld the government's wiretap of telephone conversations from an individual who was suspected of being part of a bootlegging network during Prohibition.³³ In doing so, the Court held that since the government did not intrude on *Olmstead's* physical property,³⁴ it did not violate the Fourth Amendment's prohibition against illegal searches.³⁵ Thus, the *Olmstead* Court framed the interception of electronic communications and privacy as a spatial concept.³⁶

³⁰ Electronic Communications Privacy Act, Pub. L. No. 95-108, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

³¹ See *infra* notes 40–54 and accompanying text.

³² See *Olmstead v. United States*, 277 U.S. 438 (1928).

³³ *Id.* at 466. The wiretap in *Olmstead* took place off of *Olmstead's* property, on a telephone pole on the adjoining street. *Id.* at 456–57.

³⁴ *Id.* at 465 (“The language of the [Fourth] Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office.”).

³⁵ In its opinion, the *Olmstead* Court hinted at the SCA's future, saying:

Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

The Court revisited and overturned *Olmstead* in 1964 in *Katz v. United States*.³⁷ The *Katz* Court abandoned the *Olmstead* spatial definition of Fourth Amendment protections and held that the government's interception of Katz's telephone call, placed in a public phone booth, constituted a Fourth Amendment violation.³⁸ The Court noted in its opinion the importance of the warrant standard and the necessity of having a neutral magistrate hear the interests of the government in intercepting a communication before such an interception was deemed allowable.³⁹

To build upon the *Katz* opinion, Congress adopted the Omnibus Crime Control and Safe Streets Act of 1968, more commonly known as the Wiretap Act.⁴⁰ The statute served to reinforce the *Katz* opinion⁴¹ and made it illegal for anyone (including the government) to "willfully intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire or oral communication."⁴² The legislation's primary focus was to prevent government officials from intercepting electronic communications from individuals, absent one of the exceptions listed in the Act.⁴³

Id. at 465–66. Despite the Court's foresight, Congress did not act at the time and the *Olmstead* opinion remained the prevailing law regarding the interception of electronic communications for the next forty years. Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 21–22 (2004).

³⁶ *Olmstead*, 277 U.S. at 466 ("[T]he Fourth Amendment [has not] been violated . . . unless there has been an official search and seizure of his person, or . . . an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.").

³⁷ *Katz v. United States*, 389 U.S. 347, 353 (1967).

³⁸ *Id.* at 359. Justice Harlan's concurring opinion in the case said that Fourth Amendment expectations of privacy were reliant on "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). Justice Harlan's concurring opinion has subsequently become the prevailing opinion regarding Fourth Amendment protections. See *Kyllo v. United States*, 533 U.S. 27, 32–33 (2001).

³⁹ See *Katz*, 389 U.S. at 357 ("Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . ." (citation omitted)).

⁴⁰ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

⁴¹ See S. REP. NO. 1097, at 66 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. The Senate Report noted that the Act "was drafted to meet [constitutional] standards and to conform with *Katz v. United States*." *Id.*

⁴² 18 U.S.C. § 2511(1)(a) (1970) (current version at 18 U.S.C. § 2511 (2012)). Senator Hart, in his statement in opposition to the bill, due to its allowances for law enforcement, nonetheless noted the marked gains in technology that had arisen since the *Olmstead* decision and the implications that such advancements had for individual privacy. See S. REP. NO. 1097, at 170–71 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2231–32 (additional views of Mr. Hart in opposition to Title III).

⁴³ In support of the Act, Senator Kennedy noted that the Wiretap Act would "authorize . . . controlled electronic surveillance . . . by duly authorized law enforcement officials under a Court order procedure for the purpose of investigating specified crimes

The Wiretap Act eventually became obsolete as the technology used in electronic communication dramatically expanded in the late twentieth century.⁴⁴ Congress revisited the interception of electronic communications in 1986 when it updated the Wiretap Act by enacting ECPA.⁴⁵ Title I of ECPA continued the 1968 protections by prohibiting the interception of electronic communications in transit.⁴⁶ Thus, Title I encompassed activity such as telephone wiretaps as long as the communication took place in interstate commerce.⁴⁷

Congress also considered the widespread use of computer communications for the first time in ECPA.⁴⁸ Title II of ECPA, commonly known as the Stored Communications Act, prohibits the unauthorized access or disclosure of stored electronic communications.⁴⁹ More specifically, § 2702, known as the voluntary disclosure provision, is the most pertinent section that affects the digital inheritance problem.⁵⁰ Specifically, § 2702 of the SCA prohibits electronic service providers and remote computing services from disclosing account content to unauthorized individuals.⁵¹

B. Entities and Individuals Covered by the Stored Communications Act

To figure out how social media and email providers are affected by the SCA it is important to figure out who is regulated by the SCA. The SCA generally regulates three groups of individuals or entities: individual actors,⁵²

involving national security and serious offenses.” S. REP. NO. 1097, at 214 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2212, 2264 (additional views of Mr. Kennedy of Massachusetts, Mr. Tydings, Mr. Smathers, and Mr. Fong).

⁴⁴ See S. REP. NO. 99-541, at 2 (1986). The Wiretap Act was said to have “not kept pace with the development of communications and computer technology.” *Id.*

⁴⁵ See Electronic Communications Privacy Act, Pub. L. No. 95-108, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

⁴⁶ S. REP. NO. 99-541, at 3 (1986) (“Title I of the Electronic Communications Privacy Act addresses the interception of wire, oral and electronic communications. It amends existing chapter 119 of title 18 to bring it in line with technological developments and changes in the structure of the telecommunications industry.”).

⁴⁷ *Id.* at 11–12. The Act “encompasses the whole of a voice telephone transmission.” *Id.* at 12.

⁴⁸ See Electronic Communications Privacy Act, Pub. L. No. 95-108, 100 Stat. 1848. In response to a letter that Senator Leahy sent to the Attorney General asking whether the Wiretap Act of 1968 provided appropriate protections for new forms of electronic communications, the Department of Justice responded, “In this rapidly developing area of communications which range from cellular non-wire telephone connections to microwave-fed computer terminals, distinctions such as [whether there does or does not exist a reasonable expectation of privacy] are not always clear or obvious.” S. REP. NO. 99-541, at 4 (1986).

⁴⁹ 18 U.S.C. §§ 2701–2702 (2012).

⁵⁰ See *id.* § 2702.

⁵¹ *Id.* § 2702(a)–(b).

⁵² *Id.* § 2701. Individuals are generally prohibited from accessing stored communications without the authorization of the owner. *Id.*

government agents,⁵³ and public providers of electronic communications.⁵⁴ The provision of the SCA regulating public providers of electronic communication, which generally prohibits voluntary disclosure,⁵⁵ most affects social media and email providers and is at the center of the digital inheritance problem.⁵⁶

The SCA's voluntary disclosure provision regulates two types of public providers of electronic communications: electronic communication services and remote computing services.⁵⁷ These two terms are relics of the early era of computing when the SCA was adopted and their distinction serves very little purpose in today's enforcement.⁵⁸ Nonetheless, these two terms still remain relevant in determining who is covered under the SCA's voluntary disclosure provision.⁵⁹

1. *Electronic Communication Services*

Email providers generally constitute electronic communication services. An electronic communication service is defined by the SCA as "any service which provides to users . . . the ability to send or receive wire or electronic communications."⁶⁰ When the SCA was enacted, email was an emerging technology, but the process still works similarly today as it did in 1986.⁶¹ When a user clicks "send" on an email, a mail transfer agent (MTA) breaks the information into small "packets" which are sent over varying digital routes to

⁵³ *Id.* § 2703. The SCA generally requires government officials to secure a warrant before the government can access stored communications. *Id.*

⁵⁴ *Id.* § 2702. Public providers of electronic communications are generally prohibited from disclosing account information or content, absent a warrant or consent from the account holder. *Id.*

⁵⁵ 18 U.S.C. § 2702 (2012). For more information, generally, on the voluntary disclosure provision of the SCA, see Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1220–22 (2004).

⁵⁶ See *infra* Part VI.

⁵⁷ 18 U.S.C. § 2702.

⁵⁸ Eric R. Hinz, *A Distinctionless Distinction: Why the RCS/ECS Distinction in the Stored Communications Act Does Not Work*, 88 NOTRE DAME L. REV. 489, 514–18 (2012) (arguing that in many circumstances, online services can constitute an RCS or an ECS, depending on the situation).

⁵⁹ See U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 117 (2009), available at <http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf>.

⁶⁰ 18 U.S.C. § 2510(15) (2012).

⁶¹ Compare J. KLENSIN, SIMPLE MAIL TRANSFER PROTOCOL 4 (2001), available at <http://www.ietf.org/rfc/rfc2821.txt> (illustrating the current general email transfer process), with JONATHAN B. POSTEL, SIMPLE MAIL TRANSFER PROTOCOL 1 (1982), available at <http://www.ietf.org/rfc/rfc821.txt> (illustrating the general email transfer process prior to the SCA's adoption).

the intended address.⁶² Once all of the packets arrive at their destination, a mail delivery agent (MDA) reassembles each packet into a message that sits in storage until the recipient opens and reads the message.⁶³ Because of the way email works, courts have generally held that the term “electronic communication services” applies only to services that are involved in the active and current transmission of electronic messages.⁶⁴ However, some social network providers may fit the definition of electronic communication services, too, depending on the types of messaging services they provide.⁶⁵

2. Remote Computing Services

Many social media providers constitute remote computing services under the SCA as well.⁶⁶ The SCA defines remote computing services as “computer storage or processing services by means of an electronic communications system.”⁶⁷ At the time of the SCA’s adoption, many large companies used offsite computers to store and process large quantities of data.⁶⁸ Since the data was out of the owner’s control during storage and processing, Congress extended the SCA’s protection to prevent the disclosure of this private information.⁶⁹ Although the need to process data offsite has since dwindled, the SCA prohibitions for remote computing services remain and new remote

⁶²United States v. Councilman, 418 F.3d 67, 69–70 (1st Cir. 2005) (holding that interception and copying of emails before forwarding to alternative email address constituted a violation of the Electronic Communications Privacy Act).

⁶³*Id.* at 70. The *Councilman* court notes that the entire process of electronic communication, though complex, takes only a few seconds to complete. *Id.*

⁶⁴*See* Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 461–63 (5th Cir. 1994) (holding that since messages intercepted by the Secret Service were in storage on computer when they were acquired, the action of acquiring the emails came under the scope of the SCA and not ECPA).

⁶⁵*See* U.S. DEP’T OF JUSTICE, *supra* note 59, at 117. Electronic bulletin boards fall under the definition of an electronic communication service. *Id.* Facebook, Twitter, Tumblr, and Pinterest all have online electronic bulletin board functions as integral parts of their products and thus could constitute an electronic communication service. *See, e.g., Get Started*, FACEBOOK, <https://www.facebook.com/help/467610326601639/> (last visited Mar. 14, 2013).

⁶⁶*See* Viacom Int’l Inc. v. YouTube Inc., 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (holding that video storage by YouTube qualifies as a remote computing service); *see also* Mark Howitson, Deputy Gen. Counsel, Facebook, Keynote Address at LegalTech New York 2010: Facebook: Perspectives on Corporate eDiscovery and Social Media (Feb. 2, 2010), available at http://www.legaltechshow.com/r5/context.asp?sweeps_code=ltny2010.

⁶⁷18 U.S.C. § 2711(2) (2012).

⁶⁸S. REP. NO. 99-541, at 10 (1986).

⁶⁹*See id.* at 3 (stating that “because [the information] is subject to control by a third party computer operator, the information may be subject to no constitutional privacy protection”).

storage purposes have since arisen.⁷⁰ As such, because the services offered by social media providers often include storage of data, they often constitute remote computer services for purposes of the SCA.⁷¹

In essence, modern day social media providers constitute either an electronic communication service or a remote computing service.⁷² Because of the character of social media sites, providers either are involved in the active and current transmission of electronic communications or provide storage space for their customers and users to remotely store electronic communications.⁷³ Thus, nearly every social media provider is covered under the SCA.

C. Types of Activity That the SCA Prohibits

The relevant portion of the SCA prohibits electronic communication services and remote computing services from voluntarily disclosing user information or account content to another person or entity.⁷⁴ Thus, since social media providers generally constitute either electronic communication services or remote computing services,⁷⁵ social media and email providers are prohibited from disclosing account access information or account content except to the account holder, absent one of the exceptions listed in the Act.⁷⁶

⁷⁰ See Robert Johnson, *Scaling Facebook to 500 Million Users and Beyond*, FACEBOOK (July 26, 2010, 2:06 PM), https://www.facebook.com/note.php?note_id=409881258919 (describing the in-house operations teams that manage the large amounts of data stored on Facebook). Facebook introduced its photograph feature in 2005 and has since become the largest storage medium for digital photographs in the world. *Id.* As of 2010, Facebook used more than 1.5 petabytes of memory to store more than fifty billion photographs for its 500 million users on its servers; users upload an additional 220 million photographs daily. *Id.* Similarly, seventy-two hours of video are uploaded to YouTube every minute. *YouTube's 7th Birthday*, YOUTUBE (May 20, 2012), http://www.youtube.com/watch?feature=player_embedded&v=GLQDPH0ulCg.

⁷¹ See Hinz, *supra* note 58, at 517–18 (describing how Facebook's features meet the definition of both a remote computing service and an electronic communication service).

⁷² See *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 987 (C.D. Cal. 2010) (holding that if the message is unopened, then the provider is an electronic communication service; if, on the other hand, the content is stored, the provider constitutes a remote computing service).

⁷³ See Hinz, *supra* note 58, at 517–18.

⁷⁴ 18 U.S.C. § 2702(a)–(b) (2012). The SCA also prohibits individuals, entities, and government officials from accessing digital accounts or content. *Id.* §§ 2701, 2703. The criminal portion of the Act makes it illegal for individuals to access the contents and accounts of users, thereby essentially preventing the government from accessing accounts by enlisting private actors. *Id.* § 2701. The SCA prohibits government agents from accessing digital accounts or content without a warrant. *Id.* § 2703.

⁷⁵ See *supra* Part III.B.1–2.

⁷⁶ 18 U.S.C. §§ 2702(b), 2703(e); see also Kerr, *supra* note 55, at 1223 (stating that disclosure is only allowed in the case of one of the eight enumerated exceptions).

The SCA provides both a civil and criminal cause of action for individuals and entities that violate the Act.⁷⁷ In civil cases, damages can include damages incurred by the plaintiff, disgorgement of profits made by the violator, and appropriate injunctive relief.⁷⁸ Individuals who violate the Act can be held criminally liable, too, and depending on the intent of the violation, can face a fine and up to ten years in prison.⁷⁹

The SCA enumerates several exceptions where electronic communication services and remote computing services such as social media and email providers may voluntarily divulge account content and information.⁸⁰ The two most notable exceptions for the case of social media and email providers are the consent exception⁸¹ and the court order exception.⁸² Under the consent exception, social media and email providers may give account information or content to a requesting party if an individual account holder provides express permission.⁸³ The court order exception, on the other hand, absolves social media and email providers of liability when they disclose information by order of a court, even if the individual account holder refuses to consent or is unable to consent to disclosure.⁸⁴ However, the exceptions provided by the SCA still frustrate digital inheritance.⁸⁵

IV. HOW THE SCA COMPOUNDS THE DIGITAL INHERITANCE PROBLEM

The problem of digital inheritance and the SCA lies in how private social media and email providers have interpreted their potential liability under the Act. The lack of clarity under the SCA concerning whether the Act would apply to estates accessing deceased users' accounts has encouraged private social media and email providers to err on the side of caution and adopt policies that disallow anyone other than the user from accessing the deceased user's account.⁸⁶ First, in response to the SCA, email providers have created strict

⁷⁷ 18 U.S.C. §§ 2701, 2703, 2707.

⁷⁸ *Id.* § 2707(b)–(c); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1055 (N.D. Cal. 2012) (holding that “a violation of the Wiretap Act or the Stored Communications Act may serve as a concrete injury for purposes of Article III injury analysis”).

⁷⁹ 18 U.S.C. § 2701(b) (2012).

⁸⁰ *Id.* §§ 2702(b), 2703(e); *see also* Kerr, *supra* note 55, at 1223 (stating that disclosure is only allowed in the case of one of the eight enumerated exceptions).

⁸¹ 18 U.S.C. § 2702(b)(3).

⁸² *Id.* § 2703(c)(1)(B).

⁸³ *Id.* § 2702(b)(3). The consent exception allows entities covered under the SCA to disclose information “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.” *Id.*

⁸⁴ *See id.* § 2703(c)(1)(B). The SCA also expressly denies a cause of action for acts “in accordance with the terms of a court order.” *Id.* § 2703(e).

⁸⁵ *See infra* Part IV.D.

⁸⁶ In describing the confusion surrounding its role in social media, Mark Howitson, Deputy General Counsel of Facebook, expressed hope that courts could add clarity to the

privacy policies that prohibit access and disclosure of account information or content. Similarly, social network privacy policies reflect the SCA's influence and prohibit families and estates from gaining access to deceased users' account content or information. Third, social media websites that store digital content with real world monetary value generally prohibit family and estate access to the property, although illustrative cases of the SCA's influence are less present. Finally, the SCA's exceptions prove to be no cure to the digital inheritance problem.

A. How the SCA Affects Email Privacy Policies

Commercial email providers are covered under the SCA and their terms of service and privacy policies reflect this fact.⁸⁷ As electronic communication services, email providers are prohibited from disclosing account information or content to any person or entity, absent one of the Act's eight listed exceptions.⁸⁸ This has been interpreted by providers to include estates of deceased users so as to protect the company against potential liability.⁸⁹ As such, the privacy policies of major email providers almost uniformly prohibit the estates of deceased users from accessing accounts after death.⁹⁰

Yahoo's terms of service and privacy policy have received the most public attention regarding the problem of digital inheritance and are indicative of the confusion that currently exists at the intersection of the SCA and digital inheritance.⁹¹ The case of Lance Corporal Ellsworth involved Yahoo's stringent

situation, saying that he is "itching for that fight" and waiting for a case to go before a federal judge to define exactly what content on Facebook is protected so that it's clearer to everyone. Howitson, *supra* note 66.

⁸⁷ See S. REP. NO. 99-541, at 8 (1986); see also Fowler, *supra* note 21, at A12.

⁸⁸ See Kerr, *supra* note 55, at 1216, 1223 (illustrating under which circumstances social media providers are allowed to disclose information).

⁸⁹ See Fowler, *supra* note 21, at A12 ("[C]ompanies have largely interpreted [the Act] to mean that families can't force companies to let them access the deceased's data or their accounts."); see also Howitson, *supra* note 66.

⁹⁰ See Fowler, *supra* note 21, at A12.

⁹¹ *Yahoo Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last updated Mar. 16, 2012). In clarifying its stance on accessing user accounts after death, Yahoo! makes clear that estates cannot be granted access to the account or passwords in the event of the user's death: "[N]either the Yahoo account nor any of the content therein are transferable, even when the account owner is deceased. As a result, Yahoo cannot provide passwords or access to deceased users' accounts, including account content such as email." *Options Available When a Yahoo Account Owner Passes Away*, YAHOO!, <https://help.yahoo.com/kb/groups/SLN9112.html?impressions=true> (last updated Sept. 12, 2013). Similarly, Gmail and Hotmail, two other large commercial email providers, have restrictions on estates accessing deceased users' accounts, although each policy is not as strict as Yahoo's. Gmail bars access to deceased users' accounts, but does maintain a lengthy process for estates to gain access to account content with no guarantee that estates can actually gain account content. *Accessing a Deceased Person's Mail*, GOOGLE, <http://support.google.com/mail/bin/answer.py?hl=en&answer=14300> (last visited Feb. 1,

policy regarding access to deceased users' email.⁹² Yahoo's strict privacy policy, in place as a safeguard against SCA liability,⁹³ prohibited the transfer of the account or any of its contents to the fallen Marine's family.⁹⁴

Yahoo! has only allowed estates to have access to deceased users' accounts by following the exceptions listed under the SCA.⁹⁵ Under one SCA exception, Yahoo! abides by court orders requiring the email provider to relinquish access to deceased users' estates.⁹⁶ Under another SCA exception, in line with the SCA's exception for user consent to access,⁹⁷ a Yahoo! spokesperson said that to ensure a user's account can be transferred at death, "users need to provide consent and their account information in their estate plans."⁹⁸ Thus, as illustrated, the SCA has influenced email providers such as Yahoo! to adopt strict privacy policies that frustrate digital inheritance.

B. How the SCA Has Influenced Social Network Privacy Policies

As social network websites have developed and evolved, they, too, have come under the SCA's scope.⁹⁹ Social media providers have come to fill many roles in electronic communication—they serve as messaging services,¹⁰⁰ as a hub for video communication,¹⁰¹ and as a repository for digital photographs.¹⁰²

2014). Hotmail maintains a similar lengthy process that requires estates to provide a long list of documentation and specific information about the account that may not be readily available to the estate such as the date of the account's creation and the last time that it was accessed. *My Family Member Died Recently/Is in Coma, What Do I Need To Do To Access Their Microsoft Account?*, MICROSOFT COMMUNITY (Mar. 15 2012), <http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6>.

⁹² See *supra* notes 9–20 and accompanying text.

⁹³ See Fowler, *supra* note 21, at A12.

⁹⁴ See Hu, *supra* note 10.

⁹⁵ See *id.*

⁹⁶ 18 U.S.C. § 2703(c)(1)(B) (2012). Lance Corporal Ellsworth's family eventually obtained access to the content of the Marine's account after a court granted an order requiring Yahoo! to give the family the account's content. Chambers, *supra* note 16.

⁹⁷ 18 U.S.C. § 2702(b)(3).

⁹⁸ Fowler, *supra* note 21, at A12. However, the consent exception is not enough to avoid the digital inheritance problem. See *infra* Part IV.D.2.

⁹⁹ See Howitson, *supra* note 66. In a 2010 talk, Mark Howitson, Deputy General Counsel for Facebook, asserted that Facebook could not disclose information about its customer's account or account content because of the SCA's prohibitions. *Id.* Additionally, Howitson stated that what is and is not covered under the SCA is still unclear. *Id.*

¹⁰⁰ Facebook offers an instant chat feature that allows its users to send electronic messages between their friends in real time. See Josh Wiseman, *Facebook Chat: Now We're Talking*, FACEBOOK (Apr. 6, 2008, 5:33 AM), <https://blog.facebook.com/blog.php?post=12811122130>.

¹⁰¹ See *About YouTube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Jan. 20, 2013).

¹⁰² See Doug Beaver, *Facebook Photos Infrastructure*, FACEBOOK (May 21, 2007, 4:39 PM), <https://blog.facebook.com/blog.php?post=2406207130>.

Accordingly, issues have arisen involving the intersection of digital estates, social network privacy policies, and the SCA.

As social network sites such as Facebook and Twitter have come under the SCA's scope as remote computing services, their privacy policies have incorporated the SCA restrictions about who can access user accounts and content.¹⁰³ In general, like email providers, social network providers prohibit anyone from accessing or using a deceased user's account and account content.¹⁰⁴ The impact of such policies is illustrated in the case of Alison Atkins.¹⁰⁵ Due to strict privacy policies, Alison's family members were prohibited from accessing her social network accounts after her death because of privacy policies influenced by the SCA.¹⁰⁶ Facebook has been especially resistant to account access and, in several instances, has even changed the passwords of deceased users' accounts when it discovers that family members or estates are accessing the account.¹⁰⁷

Social network websites have taken on a new and unique role in digital death which makes their role in digital estates even more profound. Beginning at its inception, Facebook deleted the accounts of deceased users after thirty days.¹⁰⁸ As sites like Facebook grew in popularity, though, profiles of deceased users became a central point for online grieving, replacing funeral registries.¹⁰⁹

¹⁰³ See Fowler, *supra* note 21, at A12.

¹⁰⁴ See *Deactivating, Deleting & Memorializing Accounts*, FACEBOOK, <http://facebook.com/help/359046244166395> (last visited Oct. 12, 2012). Twitter, another popular social network website, has a similar policy of restricting access to deceased users' accounts: "We are unable to provide account access to anyone regardless of his or her relationship to the deceased." *Contacting Twitter About a Deceased User*, TWITTER, <http://support.twitter.com/articles/87894-how-to-contact-twitter-about-a-deceased-user> (last visited Jan. 20, 2014).

¹⁰⁵ See Fowler, *supra* note 21, at A1, A12.

¹⁰⁶ See *id.* at A12. A spokesperson for Facebook stated that it will respond to requests "in a way that is sensitive to [a family's] loss and is consistent with applicable law, which limits a provider's ability to disclose data to third parties Allowing ongoing access to accounts . . . could potentially run afoul of federal wiretapping law." *Id.* (alteration in original).

¹⁰⁷ See Ada Kulesza, *What Happens to Your Facebook Account When You Die?*, LAWYERS.COM (Feb. 3, 2012), <http://blogs.lawyers.com/2012/02/what-happens-to-facebook-account-when-you-die/> (Facebook changed the password for the account of a deceased user when it discovered that the mother of the decedent had accessed the account by obtaining the account password from the decedent's friend); see also Fowler, *supra* note 21, at A12.

¹⁰⁸ See Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1662 (2012) (discussing the evolution of Facebook's memorialization policy and the policy's shortcomings).

¹⁰⁹ The idea of memorializing Facebook pages first came about early on in the website's history after an employee was killed in a bicycle accident. Max Kelly, *Memories of Friends Departed Endure on Facebook*, FACEBOOK (Oct. 26, 2009, 11:48 AM), <https://blog.facebook.com/blog.php?post=163091042130>. As an alternative option, Facebook allows family members to request that the account of a deceased user be permanently deleted. See *Deactivating, Deleting & Memorializing Accounts*, *supra* note 104.

In response, Facebook began the policy of transforming accounts of deceased users to memorial accounts upon the request of a user's family.¹¹⁰ This aspect of memorialization has created its own problems for Facebook and the digital inheritance problem, though, because families have sought access to the personal content that deceased users have stored on their individual accounts, which may not be visible on the page's memorialized state.¹¹¹ In these instances, Facebook has vehemently denied account access to requesting families and estates, citing privacy concerns over the account, thus further compounding the issue of digital inheritance and the SCA.¹¹²

C. How the SCA Influences Privacy Policies of Online Gaming Sites and Other Digital Property Websites

The SCA applies to social media websites that harbor digital assets with real-world monetary value as well and, as a result, can inhibit digital asset inheritance. Some gaming websites involve digital assets such as characters that can be traded for money.¹¹³ In terms of online gaming websites and other websites that involve assets with real-world monetary value, the privacy policies reflect the SCA's influence, similar to social network websites or email providers. For instance, World of Warcraft, a game played by Jerald Spangenberg and Nathan Vogel, only allows account holders to access game accounts.¹¹⁴ Thus, when a user dies and the estate is denied access to an account, the estate can be denied access to assets that have real-world monetary value that are associated with the account.¹¹⁵

¹¹⁰ See Monica Hortobagyi, *Slain Students' Pages To Stay on Facebook*, USA TODAY, http://usatoday30.usatoday.com/tech/webguide/internetlife/2007-05-08-facebook-vatech_N.htm (last updated May 9, 2007, 9:53 PM).

¹¹¹ *Rock Center with Brian Williams: Digital Afterlife: Family Fights To Access Dead Son's Facebook Page* (NBC television broadcast June 1, 2012), available at <http://www.nbcnews.com/video/rock-center/47638596#47638596>. The family of Ben Stassen sought access to their son's account after he committed suicide. *Id.*; see also Mazzone, *supra* note 108, at 1662.

¹¹² See Fowler, *supra* note 21, at A12. In response to a protracted legal battle, Facebook deleted the account of Loren Williams, a college student from Oklahoma who was killed in a motorcycle accident, after granting his mother ten months of access. Associated Press, *Karen Williams' Facebook Saga Raises Questions of Whether Users' Profiles Are Part of "Digital Estates,"* HUFFINGTON POST, http://www.huffingtonpost.com/2012/03/15/karen-williams-facebook_n_1349128.html (last updated Mar. 15, 2012, 5:57 PM).

¹¹³ Cristina Jimenez, *The High Cost of Playing Warcraft*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/7007026.stm> (last updated Sept. 24, 2007, 7:58 AM).

¹¹⁴ See Svensson, *supra* note 27.

¹¹⁵ If an estate could gain access to accounts containing characters with such value, the estate could theoretically sell off the characters to other users to pay off debts of the estate or provide the assets to appropriate heirs or beneficiaries. See Kelly Greene, *Passing Down Digital Assets*, WALL ST. J., Sept. 1–2, 2012, at B8.

The problem of digital assets extends beyond the online gaming world, as well. Websites such as Amazon and iTunes allow users to upload copies of their self-produced manuscripts or musical compositions in hopes of gaining exposure to potential publishers or producers.¹¹⁶ In this capacity, these websites serve as remote computing services and are thus covered by the SCA.¹¹⁷ Although there does not seem to be any current case in which Amazon, iTunes,¹¹⁸ or another similar site has denied an estate access to a decedent's account or content, the possibility remains, especially considering the reactions and policy of similarly situated websites such as Yahoo! or Facebook.¹¹⁹

D. The Exceptions to the SCA Do Not Provide an Out for Digital Inheritance

The SCA provides two relevant exceptions with respect to digital inheritance. If a user consents to another party accessing accounts and content,¹²⁰ or if a court grants an order requiring a social media or email provider to hand over account access or content to an estate,¹²¹ then social media and email providers and the estates of deceased users are not liable under the SCA. However, these two exceptions do not alleviate the digital inheritance problem. In the case of the SCA's court order exception, the cost of court orders and the time required to obtain a court order may complicate estate administration, especially for accounts that may be deleted in rapid time frames. Additionally, because social media users are unlikely to have a will or plan for the disposition of their digital assets, the SCA's consent exception does not

¹¹⁶ Amazon users can post their manuscripts onto the website to sell digital copies of their work for a range of \$.99 to \$4.99 and keep seventy percent of the revenue. See *Kindle Singles Submissions Policy*, AMAZON, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000700491> (last visited Jan. 20, 2013). Individuals can also upload content to Apple iTunes by themselves or with the help of third party services. *Music Providers: Frequently Asked Questions*, APPLE, <http://www.apple.com/itunes/working-itunes/sell-content/music-faq.html> (last visited Feb. 7, 2014); see also Christopher Breen, *Death and iTunes*, MACWORLD (Apr. 20, 2011, 11:15 AM), <http://www.macworld.com/article/1159358/death-itunes.html> (suggesting that Apple also has the authority to restrict or deny a family member's access to a user's iTunes downloads once the user is deceased).

¹¹⁷ See *supra* Part III.B.2.

¹¹⁸ An Apple representative stated that it does not have "a policy to will or inherit an iTunes collection." Roger Yu, *Digital Inheritance Laws Remain Murky*, USA TODAY, <http://usatoday30.usatoday.com/tech/story/2012/09/19/digital-inheritance/57804428/1> (last updated Sept. 19, 2012, 2:55 PM).

¹¹⁹ One commentator has noted that the privacy policies of iTunes and Amazon will not allow people to transfer the contents of their accounts after death. Geoffrey A. Fowler, *Why You Can't Bequeath Your Digital Library*, WALL ST. J. (Jan. 4, 2013, 10:34 PM), <http://blogs.wsj.com/digits/2013/01/04/why-you-cant-bequeath-your-digital-library/>.

¹²⁰ 18 U.S.C. § 2702(b)(3) (2012).

¹²¹ *Id.* § 2703(c)(1)(B).

alleviate SCA interference in digital inheritance. Thus, the exceptions provided by the SCA do not relieve the digital inheritance problem.

1. Court Orders

Court orders do not resolve the digital inheritance problem. Court orders are one of the enumerated exceptions in the SCA under which content providers may provide account access or account content to someone other than the registered user.¹²² Due to worries over liability, social media and email providers generally provide limited access to deceased users' digital content only after the party seeking access has obtained a court order mandating access to the digital content.¹²³ Although heirs and beneficiaries have generally been able to obtain account access or content, court orders are still inherently problematic.¹²⁴ First, parties who pursue litigation in order to gain access to a decedent's account can experience significant costs and delays, which add additional costs to administration of the estate. Second, many social media and email providers delete account content or accounts that have not been accessed for a given period of time. Thus, heirs, beneficiaries, and fiduciaries must act swiftly to prevent any accounts from being deleted or having content permanently lost. Lastly, even if a court order is granted, the response of social media and email providers may not satisfactorily provide the information that is sought by the decedent's estate.

¹²² *Id.* § 2703(b)(1)(B)(ii).

¹²³ See Hu, *supra* note 10. Yahoo! will only allow access if the estate receives a court order mandating access. *Id.*; see also Cha, *supra* note 10, at A17.

¹²⁴ Courts do not always grant access to estates. In 2012, the executor for Sahar Daftary, a former British model, was denied access to the decedent's Facebook profile; the executor was hoping to obtain information that would dispel rumors that the model had committed suicide. In denying the request, U.S. Magistrate Judge Paul Grewel held:

The case law confirms that civil subpoenas may not compel production of records from providers like Facebook. . . . It would be odd, to put it mildly, to grant discovery related to foreign proceedings but not those taking place in the United States. Nor is the court persuaded that Applicants' consent on Sahar's behalf distinguishes these precedents so as to justify compelling production. . . . [C]onsent may *permit* production by a provider, it may not *require* such a production. The applicants subpoena must be quashed.

In re Request for Order Requiring FACEBOOK, INC. To Produce Documents and Things, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012). Daftary's boyfriend was initially suspected of murdering the twenty-three-year old model and the executor hoped to dispel rumors of suicide in hopes of murder charges. *Id.* at 1205; *Dead Model's Partner Not Charged*, BBC NEWS (Apr. 17, 2009, 4:48 PM), http://news.bbc.co.uk/2/hi/uk_news/england/manchester/8004701.stm.

a. Requiring a Court Order Adds to the Time and Cost of Estate Administration

One of the primary problems with requiring a court order for estates to access social media and email accounts is the cost of litigation, which adds to the costs and time of estate administration.¹²⁵ The cost of obtaining access to account information and content can deplete an estate of resources and may require attorney fees where the estate may otherwise have minimal probate costs.¹²⁶

The cost of litigation in addition to the cost of estate administration is one of the primary problems with requiring a court order to access deceased users' social media and email accounts and digital content. The primary costs of estate administration are court fees and any costs for the personal representative's commission.¹²⁷ Additionally, attorney fees for estates vary by state, but are generally assessed on a sliding scale, based on the estate's size.¹²⁸ When families and estates seek to gain access to social media and email accounts, they must bear further legal costs, including court costs and attorney fees.¹²⁹ Moreover, these suits are filed in civil, rather than probate courts, which adds greater workloads to overloaded civil dockets.¹³⁰ Thus, requiring a court order adds an unnecessary and expensive step to estate administration.

Requiring a court order also adds to the time it takes to administer a decedent's estate. Although estate administration can be a lengthy process,¹³¹

¹²⁵ See Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 S. TEX. L. REV. 449, 454 (2009) (mentioning that cost is one of the public's three main concerns with probate, along with delay and privacy).

¹²⁶ For instance, Alison Atkins's estate would have had minimal costs, since she died as a minor. See Fowler, *supra* note 21, at A1. Requiring a court order thus adds an unnecessary legal cost to an otherwise simple estate.

¹²⁷ JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 45 (8th ed. 2009).

¹²⁸ *Id.* at 46. For \$100,000 estates, fees vary from \$2000 to \$5000. *Id.* Attorney fees for estates as large as \$600,000 can vary from \$9000 to \$22,000. *Id.*

¹²⁹ See Kulesza, *supra* note 107 (mentioning that Karen Williams had to retain an attorney and file suit to gain access to her son's email account).

¹³⁰ See Hu, *supra* note 10. The Ellsworths filed suit in an Oakland County, Michigan court. Stefanie Olsen, *Yahoo Releases E-mail of Deceased Marine*, CNET (Apr. 21, 2005, 12:39 PM), http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-marine/2100-1038_3-5680025.html; see also Rock Center with Brian Williams, *supra* note 111 (mentioning that the Stassens had to file in a civil suit in a Wisconsin court to gain access to their son's Facebook account).

¹³¹ See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 127, at 45. Charles Dickens most famously wrote about the length and cost of probate:

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the

estate fiduciaries are charged with closing the estate as expediently as possible.¹³² However, court orders granting access to digital content can take several months to secure.¹³³ Thus, estate fiduciaries may have to wait on a court order to gain access to social media or email accounts and close or distribute the content of those accounts. Accordingly, the SCA's requirements could delay expedient estate administration, in spite of the timeliness goal.

b. *The Problem of Time and Account Deletion*

The problem of requiring a court order to gain access to deceased user accounts is aggravated further by the fact that many social media and email sites have a deletion policy if the account goes unused for a certain period of time.¹³⁴ This problem is compounded because the time period for inactivity is often very short and does not allow adequate time for grieving family and friends to obtain a court order preventing deletion and allowing access.

Social media and email provider policies regarding account and content use and deletion do not run in sync with probate and non-probate estate administration timetables. Estate administration can be a lengthy, time-consuming process—depending on the size of the estate, estate administration can take one year or even decades.¹³⁵ Social media and email provider account policies vary between providers, but some providers mandate the deletion of accounts and content not accessed for periods as short as six months.¹³⁶ Thus,

premises Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world.

CHARLES DICKENS, *BLEAK HOUSE* 64 (Patricia Ingham ed., 2011). At the end of the novel, the reader learns that the “the whole estate is found to have been absorbed in costs.” *Id.* at 743.

¹³² DUKEMINIER, SITKOFF & LINDGREN, *supra* note 127, at 45.

¹³³ See Olsen, *supra* note 130. Justin Ellsworth's family had to endure five months of litigation before gaining access to his account. See *id.*

¹³⁴ For instance, Twitter deletes accounts that have been inactive for six months. *Inactive Account Policy*, TWITTER, <https://support.twitter.com/articles/15362-inactive-account-policy> (last visited Mar. 23, 2014).

¹³⁵ See Sneddon, *supra* note 125, at 460. The average length of estate administration is eighteen months. PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* 49 (2003).

¹³⁶ Twitter deletes inactive accounts after six months, due to worries about the load that inactive users place on its servers. See *Inactive Account Policy*, *supra* note 134. Yahoo! deletes accounts after twelve months of inactivity. See *Reasons Your Yahoo Account Was Deleted*, YAHOO!, http://help.yahoo.com/kb/index?locale=en_US&y=PROD_ACCT&page=content&id=SLN3057 (last updated Dec. 16, 2013). Previously, Yahoo! deleted accounts after only four months of inactivity. Stan Schroeder, *How Long Do Webmail Services Keep Your Account Alive?*, MASHABLE (Feb. 9, 2009), <http://mashable.com/2009/02/09/webmail-account-dormant-alive/>. Gmail's policy indicates that if a user does not use an account for a

an account can be deleted and its content lost before the completion of the estate administration process.

c. Granting a Court Order Is Not a Satisfactory Solution to the Digital Inheritance Problem

Even after a court grants an order mandating access to account information and content, the legal battle still may not be over. The legal departments of social media and email providers can still take substantial time to process the request and grant access to account information and content.¹³⁷ Moreover, even if a court order is granted, the resolution still may not be satisfactory for some estates because social media and email providers still may not provide families with the content that they requested.¹³⁸ For instance, in the case of Lance Corporal Ellsworth, Yahoo! only provided a limited amount of his email to his family in complying with the court's order to turn over the contents of the account.¹³⁹

The value of social media accounts has expanded since the inception of social media websites ten years ago.¹⁴⁰ After a court order is issued, most social media and email sites comply with the court order by delivering a copy of all account contents on a compact disc.¹⁴¹ This may not be a satisfactory solution for some social media accounts, though, because some social media profiles have become income generators for their registered owners.¹⁴² Blogs, for instance, can develop tremendous followings and corresponding business

period of nine months, the account may be deleted. *Inactive Gmail Account*, GOOGLE (Mar. 9, 2011), <http://productforums.google.com/forum/#!topic/gmail/TR4yPI6vMU>. Facebook will not delete inactive accounts. See Pat Smith, *How Long Does It Take for an Inactive Facebook Account To Be Deleted?*, EHOW, http://www.ehow.com/info_8704121_long-inactive-facebook-account-deactivated.html (last visited Feb. 8, 2014).

¹³⁷ See *Rock Center with Brian Williams*, *supra* note 111 (even after the Stassens obtained a court order granting access to their son's Facebook account, Facebook still took a long time to process the request).

¹³⁸ See Chambers, *supra* note 16. The Ellsworths received a compact disc from Yahoo! that contained messages that their son had received; the disc did not contain messages that Lance Corporal Ellsworth had sent. *Id.*

¹³⁹ See *id.*

¹⁴⁰ The average American now values his social media accounts at more than \$55,000. See Greene, *supra* note 115, at B8. This number can be much larger for estates where the profile has a significant advertising component that produces revenue. See ERIK QUALMAN, *SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS* 26–29 (2009).

¹⁴¹ See Zaslow, *supra* note 15. Google and Twitter also supply families of deceased users with the account contents on a compact disc if they receive a court order mandating the release of the content.

¹⁴² See QUALMAN, *supra* note 140, at xvii.

opportunities for their owners.¹⁴³ Accordingly, some digital estates, such as those containing revenue-producing blogs, can derive their value from the continued use of the associated account.¹⁴⁴ Gaining access merely to the contents of these accounts may still prohibit heirs and beneficiaries from deriving a monetary benefit from these sites and their corresponding followers, though, because heirs and beneficiaries would lose access to the blog's greatest asset: its followers.

2. Consent

The SCA provides an exception for individuals and entities who receive consent from the owner of an account.¹⁴⁵ Consent is a lofty goal in the realm of digital inheritance, though, considering the primary demographics for social media users.

Social media users are overwhelmingly young,¹⁴⁶ which means social media's primary demographic is also the demographic least likely to have a will.¹⁴⁷ Thus, it is unlikely that a social media user will die with an estate plan, much less an estate plan that spells out what should happen to the decedent's digital assets.¹⁴⁸ This is further evidenced by the instances where conflicts between digital estates and the SCA have arisen: with the exception of one

¹⁴³ See *The Twenty-Five Most Valuable Blogs in America—2011*, 24/7 WALL ST. (Oct. 31, 2011, 4:16 AM), <http://247wallst.com/2011/10/31/the-twenty-five-most-valuable-blogs-in-america-2011/>.

¹⁴⁴ For instance, if digital inheritance were allowable, an estate could maintain a decedent's successful Amazon account with manuscripts and continue to sell to potential readers.

¹⁴⁵ 18 U.S.C. § 2702(b)(3) (2012). Yahoo! and Facebook have stressed the importance of ensuring that consent to access digital assets and accounts is an aspect of individuals' estate plans. See Fowler, *supra* note 21, at A12.

¹⁴⁶ Fifty-two percent of registered American adult Facebook users are under age thirty-five. Justin Smith, *December Data on Facebook's US Growth by Age and Gender: Beyond 100 Million*, INSIDEFACEBOOK.COM (Jan. 4, 2010), <http://www.insidefacebook.com/2010/01/04/december-data-on-facebook's-us-growth-by-age-and-gender-beyond-100-million/>. Twitter has a slightly higher average user age, but still remains relatively young with forty-five percent of active users reporting their age as younger than thirty-five. *Report: Social Networks Demographics in 2012*, PINGDOM (Aug. 21, 2012), <http://royal.pingdom.com/2012/08/21/report-social-network-demographics-in-2012/>. In the case of email, seventy-two percent of Gmail users, sixty-four percent of Hotmail users, and fifty-seven percent of Yahoo! users are under the age of thirty five. See Amanda Green, *You've Got Mail: What Your Email Domain Says About You*, HUNCH.COM (Mar. 9, 2011, 11:00 AM), <http://blog.hunch.com/?p=34824>.

¹⁴⁷ While overall, thirty-one percent of Americans have wills, only seven percent of adults under the age of thirty have wills. Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 52 (2009).

¹⁴⁸ See *id.* at 53. DiRusso also notes that individuals under the age of fifty have a "gross lack of recognition of premature mortality." *Id.* Thus, social media users, who are overwhelmingly under age fifty, will likely not plan for death, nor digital inheritance.

individual, each individual in the case studies mentioned in this Note died under the age of twenty.¹⁴⁹

The digital inheritance problem is not solely a young person problem, though. Older Americans have become pervasive users of social media as well.¹⁵⁰ Older Americans are more likely to have estate plans.¹⁵¹ However, the issue of the SCA's consent exception and digital inheritance is further compounded by the fact that most wills likely have no provision pertaining to the distribution of digital assets.¹⁵² Thus, although there is a consent exception to the SCA, due to the few social media users who have wills and the few wills that account for digital assets, the consent exception is likely to have little impact on the digital inheritance problem.

V. DIGITAL INHERITANCE SHOULD BE ALLOWED

A discussion involving the SCA and digital inheritance necessarily involves a brief discussion about the importance of digital inheritance and whether it should be allowed at all. After all, if digital inheritance was undesirable, no amendment to the SCA would be necessary. Digital inheritance has several distinct advantages. First, social media is still in its pioneering stage; the potential for social media and its future potential uses are still poorly understood. Second, social media has evolved into a coping mechanism. Lastly, social media and email can provide valuable estate administration information in the event of unexpected death and can also serve as a valuable archive for correspondence. Given these benefits, digital inheritance should be allowed.

¹⁴⁹ The only person to die over the age of twenty was Jerald Spangenberg. *See* Svensson, *supra* note 27. Every other individual died under the age of twenty: Lance Corporal Ellsworth (age nineteen), Alison Atkins (age sixteen), Nathan Vogel (age thirteen). *See supra* Part II.

¹⁵⁰ Mark Miller, *Social Media Use Surges in Over-50 Crowd*, REUTERS (Aug. 8, 2013, 11:26 AM), <http://www.reuters.com/article/2013/08/08/column-miller-idUSL1N0G90R320130808> (stating that usage among users fifty and older has tripled over the course of three years).

¹⁵¹ *See* DiRusso, *supra* note 147, at 52.

¹⁵² *See* Greene, *supra* note 115, at B8. Social media use among Americans fifty and older doubled between 2009 and 2010. MARY MADDEN, PEW RESEARCH CTR., OLDER ADULTS AND SOCIAL MEDIA SOCIAL NETWORKING USE AMONG THOSE AGES 50 AND OLDER NEARLY DOUBLED OVER THE PAST YEAR 2 (2010), *available at* <http://pewinternet.org/Reports/2010/Older-Adults-and-Social-Media.aspx>. Thus, even those who are most likely to have wills may not have planned their estate to account for the digital inheritance problem.

A. Allowing Digital Inheritance Preserves Economic Benefits and Future Beneficial Users

1. Current Economic Benefit

Some aspects of social media and email have real-world economic value for estates, beneficiaries, and heirs. Contents on social media sites, such as blogs, may have value that heirs and beneficiaries can derive financial benefit from even after the blog owner is deceased.¹⁵³ Manuscripts and musical compositions uploaded to social media sites also have potential real-world monetary value.¹⁵⁴ Additionally, some social media sites store information that has monetary value such as characters for online computer games.

Recall the cases of Jerald Spangenberg and Nathan Vogel: both were members of an online gaming community when they died.¹⁵⁵ Some characters developed in these games can have real-world value—some characters sell on online auctions websites for several hundred dollars per piece.¹⁵⁶ If estate fiduciaries were allowed access to their gaming accounts after death, these characters could be auctioned off and sold for cash, which could subsequently be used to pay any debts of the estate, or if no debts exist, could be added to the value of the estate and distributed to heirs or beneficiaries, who may have no other use for an online character. The alternative is to have these characters sit in limbo, which is a waste of resources and directly counter to public policy. Thus, allowing digital inheritance in this aspect could provide financial benefits to the estate as well as to heirs and beneficiaries.

¹⁵³ See *The Twenty-Five Most Valuable Blogs in America—2011*, *supra* note 143. If heirs can have access to private blogs after the death of the owner, they could continue to derive income from advertisements and its material.

¹⁵⁴ See Suw Charman-Anderson, *Self-published Books Hit Kindle Bestseller List*, FORBES (Jan. 14, 2013, 4:09 PM), <http://www.forbes.com/sites/suwcharmananderson/2013/01/14/self-published-books-hit-kindle-bestseller-list/>. Fifteen of the top 100 books sold for the Amazon Kindle in 2012 were self-published works. *Id.*; see also Arden Dale, *Make Sure You Know Who Will Inherit Your Twitter Account*, WALL ST. J., Sept. 19, 2013, at R3.

¹⁵⁵ See Svensson, *supra* note 27 and accompanying text.

¹⁵⁶ Some characters can sell for as much as several hundred dollars. See Greene, *supra* note 115, at B8. For a current listing of digital characters and their monetary value, see *WoW Accounts*, PLAYERAUCTIONS.COM, <http://www.playerauctions.com/wow-account/> (last visited Jan. 20, 2013). For more information on the unique value, character, and market of online gaming property, see Olivia Y. Truong, Note, *Virtual Inheritance: Assigning More Virtual Property Rights*, 21 SYRACUSE SCI. & TECH. L. REP. 57, 66–70 (2009).

2. Social Media Has Not Realized Its Future Capabilities and Thus, Its Content Must Be Preserved

Social media, its uses, and its implications are still in their infancy and still not understood.¹⁵⁷ Amending the SCA would allow family members to protect the important content created by decedents and could preserve the data and content for future uses. For instance, the SCA currently hinders heirs and beneficiaries from accessing manuscripts posted on Amazon or music posted on iTunes.¹⁵⁸ Thus, in essence, the SCA can prohibit heirs and beneficiaries from publishing works of deceased users after their deaths. So, Chaucer's *Canterbury Tales*, Jonathan Larson's *Rent*, Stieg Larsson's *Girl with the Dragon Tattoo* series, and Janis Joplin's *Pearl* album may not have seen daylight if they were created today and stored on social media networks instead of accessible archive locations.¹⁵⁹

Social media and its contents also have incomprehensible future use that makes access to and preservation of digital assets essential. In a 2011 TedTalk, Adam Ostrow discussed some future uses of social media after one dies.¹⁶⁰ Ostrow envisioned the merger of tweet predictors and a project from MIT's media lab that could allow people in the future to interact with a re-creation of our digital selves.¹⁶¹ And although this sounds like a space-age idea far off in

¹⁵⁷ See Jeffrey W. Treem & Paul M. Leonardi, *Social Media Use in Organizations: Exploring the Affordances of Visibility, Editability, Persistence, and Association*, 36 COMM. Y.B. 143, 144 (2012). Treem and Leonardi posit that social media is being adopted and expanded at such a rate that it outpaces people's and organizations' ability to understand it. *Id.*

¹⁵⁸ See *supra* notes 116–19 and accompanying text.

¹⁵⁹ Each of these works was published or made famous after the death of its creator. However, each work was accessible to an individual who could share the work with the greater world. Digital inheritance, in its current state, could prevent such works from posthumously reaching market and notoriety. See, e.g., Vicki Santillano, *Life After Death: Eight Posthumously Published Authors*, DIVINE CAROLINE, <http://www.divinecaroline.com/122444/98398-death-eight-posthumously-published-authors> (last visited Jan. 20, 2014). Hans Christian Andersen's first fairytale was recently discovered among his papers. *Morning Edition: A New Tale by Hans Christian Andersen* (NPR broadcast Dec. 13, 2012). Had the author written in the digital age, the works may have been sequestered from discovery.

¹⁶⁰ See TedTalks, *Adam Ostrow: After Your Final Status Update*, YOUTUBE (Aug. 1, 2011), <http://www.youtube.com/watch?v=D03n5dAmbSE>. In the case of Lance Corporal Ellsworth, the family wanted to preserve his email account so that his brother and sister could know their brother when they got older. See *Abrams Report*, *supra* note 11.

¹⁶¹ TedTalks, *supra* note 160. MIT's media lab is currently running a project to develop robots that "possess a novel combination of mobility, moderate dexterity, and human-centric communication and interaction abilities." *Personal Robots Group*, MIT MEDIA LAB (Jan. 12, 2013), <http://robotic.media.mit.edu/projects/robots/mds/overview/overview.html>. Several private software developers have developed a program that predicts what your next tweet could be based on prior tweets. See *THAT CAN BE MY NEXT TWEET!*, <http://yes.thatcan.be/my/next/tweet/> (last visited Jan. 21, 2013); see also *WHAT WOULD I SAY?*,

the future, perhaps an idea out of *Lost in Space*, the *Twilight Zone*, or Disney's City of Tomorrow, the technology is currently being put to use. Take, for instance, Coachella's 2012 re-creation of Tupac, which allowed modern rappers to perform with and interact with the deceased artist.¹⁶² Based on some of these concerns and potential future uses for tweets, the Library of Congress launched a program that logs every tweet ever sent in hopes of preserving them for future uses and research.¹⁶³

Allowing families, relatives, or estates to preserve digital data and accounts would allow estates to derive future benefits from deceased users' digital content. In each illustrative case, the estate could preserve the account data to allow future generations to interact with the decedent. For instance, in the case of Lance Corporal Ellsworth, the data from his email account could be preserved so that future generations could relate with the fallen soldier.¹⁶⁴ Thus, considering that the future uses of social media are not yet understood, digital content should be preserved to accommodate these potential future uses.

B. *A Coping Mechanism*

Social media serves as a coping mechanism for family and friends. Facebook in particular has proven to be a powerful coping mechanism and has replaced funeral registry books as a place of written remembrance, reflection, and coping.¹⁶⁵ Thus, families should be allowed to have access to social media content because of its newly emerging coping role.

The cases of Lance Corporal Ellsworth and Alison Atkins illustrate the important role that social media plays in coping and grief in modern culture. In each instance, the families of the decedents sought access to the decedents' social media accounts to capture a glimpse into the thoughts of their passed

would-i-say.com/ (last visited Nov. 13, 2013) (a service predicting what your next Facebook status update could be based on prior posted content). Thus, if one were to merge the two technologies in the future, it is entirely plausible for future generations to communicate with you based on the digital information you leave behind and the human-centric communication robots currently being developed.

¹⁶² See westfesttv, *Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live 2012*, YOUTUBE (Apr. 17, 2012), <http://www.youtube.com/watch?v=TGbrFmPBV0Y>. CNN also used holograms to interact with remote correspondents during election night coverage in 2008. See ARTLOVERRR, *CNN Will I Am Hologram, First Time on TV*, YOUTUBE (Nov. 4, 2008), <http://www.youtube.com/watch?v=deoOTqT-SMI>.

¹⁶³ LIBR. OF CONG., UPDATE ON THE TWITTER ARCHIVE AT THE LIBRARY OF CONGRESS 3 (2013). The program has logged 170 billion tweets over the course of six years and has so far received more than 400 research proposals for the data. *Id.* at 2, 3.

¹⁶⁴ See Hu, *supra* note 10. Ellsworth's parents hoped to preserve Ellsworth's email so that they could preserve his memory for his younger siblings. *Id.*

¹⁶⁵ See Elizabeth Stone, *Grief in the Age of Facebook*, CHRON. HIGHER EDUC. (Feb. 28, 2010), www.chronicle.com/article/Grief-in-the-Age-of-Facebook/64345/. Stone notes that in addition to serving as a coping mechanism, Facebook often serves as the medium in which people often find out about another's death. *Id.*

loved ones.¹⁶⁶ This is a microcosm of a larger societal trend in social media, too. Facebook in particular has become a central point for individuals coping with and grieving the loss of a family member or a friend.¹⁶⁷ Facebook first fully encountered its use as a coping mechanism following the 2007 Virginia Tech Massacre.¹⁶⁸ In the wake of the tragedy, and following public pressure, Facebook adapted its policy of deleting accounts.¹⁶⁹ Facebook now memorializes user profiles, which allows family and friends to create a central place to remember the deceased user.¹⁷⁰ However, family and friends are prohibited from accessing the account or the account's content.¹⁷¹ Moreover, in terms of Facebook, the user's content, such as status updates and personal messages, disappears.¹⁷² Allowing digital inheritance for social media content would allow for continued coping and grief following the death of a user.

C. An Exploratory and Archival Measure

The final benefit of digital inheritance is that allowing heirs, beneficiaries, and estate fiduciaries to have access to social media and email accounts has informational benefits. Informational benefits have several different forms in this context. First, access to email can provide individuals information and resources about the decedent's various accounts (including bank accounts, utility accounts, and social media accounts).¹⁷³ This would allow for a smoother

¹⁶⁶ See Fowler, *supra* note 21; Hu, *supra* note 10; see also Hortobagyi, *supra* note 110 (discussing Facebook's major transition point in the state of decedents' accounts that came in the wake of the Virginia Tech shooting in 2007); Jesse North, *Parents of Dead Students Use Facebook To Reconnect*, N.Y. TIMES (Nov. 27, 2007), http://www.nytimes.com/ewire/uwire_VPBN11272007877044.html?ei=5034&en=33e2718e367cfc37&ex=1274072400&.

¹⁶⁷ Kimberly Falconer, Mieke Sachsenweger, Kerry Gibson & Helen Norman, *Grieving in the Internet Age*, 40 N.Z. J. PSYCHOLOGY, No. 3, 2011, at 79, 82. Falconer, Gibson, Norman, and Sachsenweger encourage practitioners to "extend [grieving therapy] conceptualisations to include online identities." *Id.* at 85.

¹⁶⁸ See Hortobagyi, *supra* note 110. Prior to the Virginia Tech Massacre, Facebook's policy was to delete accounts when it learned about a user's death. Families and friends of victims of the Virginia Tech Massacre urged Facebook to adapt its policy following the shootings. *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ *What Happens When a Deceased Person's Account Is Memorialized?*, FACEBOOK, <https://www.facebook.com/help/103897939701143> (last visited Jan. 10, 2014).

¹⁷¹ *Id.* "Memorialized accounts cannot be modified in any way. This includes adding or removing friends, modifying photos or deleting any pre-existing content posted by the person." *Id.*

¹⁷² Mazzone, *supra* note 108, at 1661 (stating that Facebook removes status updates to protect the user's privacy).

¹⁷³ See Alejandro Martínez-Cabrera, *Dealing with Digital Assets After We Die*, S.F. CHRON., Feb. 1, 2010, at D1.

administration of estates.¹⁷⁴ Furthermore, allowing access to social media and email accounts could allow family and fiduciaries to preserve an important chronicle of history; for instance, in cases of soldiers, account access could preserve wartime correspondence home.¹⁷⁵ Because access to social media can provide for easier estate administration and allow families to chronicle wartime experiences, it is imperative that it be allowed.

Email has become a repository of information—things that traditionally have been received via postal mail, such as utility bills, now commonly arrive via email.¹⁷⁶ Email can also harbor passwords and account information for bank accounts, social media accounts, and online shopping accounts.¹⁷⁷ When a user dies, expectedly or unexpectedly, the payment and administration of accounts can be placed in limbo.¹⁷⁸ Unless another individual has access to the email account or the utility, social media, bank, or online shopping accounts, these accounts can remain unpaid long after the death of the decedent. Moreover, some of these accounts, especially online shopping accounts, can constitute creditors of the estate.¹⁷⁹ Thus, prohibiting access to decedent email addresses hinders estate administration.

Beyond account information, access to social media and email has archival benefits. For instance, wartime correspondence has long offered a unique insight into warfare and the thoughts and perspectives of those who have experienced it firsthand.¹⁸⁰ However, with the emergence of email, wartime

¹⁷⁴ DUKEMINIER, SITKOFF & LINDGREN, *supra* note 127, at 45. “The personal representative of an estate is expected to complete the administration and distribute the assets as promptly as possible.” *Id.*

¹⁷⁵ See Zaslow, *supra* note 15.

¹⁷⁶ Cha, *supra* note 10 (“E-mail accounts can hold an array of personal material, from banking and e-commerce records to notes passed among friends and family, providing a unique window into someone’s life.”); see also Martínez-Cabrera, *supra* note 173.

¹⁷⁷ See Martínez-Cabrera, *supra* note 173. In some cases, family businesses have been burdened when family dies and leaves business accounts concealed behind unknown account passwords. *Id.*

¹⁷⁸ *Id.* When the father of Karin Prangle died unexpectedly, he left a series of email accounts that no one had access to. Thus, no one could access his business accounts to cancel or ship orders, which caused the business to lose more than \$10,000. *Id.*

¹⁷⁹ Some research suggests that Generations X and Y may die with significantly more debt than previous generations. Sarah S. Jiang & Lucia F. Dunn, *New Evidence on Credit Card Borrowing and Repayment Patterns*, 51 ECON. INQUIRY 394, 405 (2013). Moreover, some scholars attribute the increase to things such as online shopping accounts. See generally STUART VYSE, GOING BROKE: WHY AMERICANS CAN’T HOLD ON TO THEIR MONEY (2008) (exploring the impact that access to credit and goods has had on American debt levels). Since passwords and accounts are generally linked to email, estates could have difficulty satisfying these debts. See Martínez-Cabrera, *supra* note 173, at D1.

¹⁸⁰ Douglas Brinkley, *Foreword to WAR LETTERS: EXTRAORDINARY CORRESPONDENCE FROM AMERICAN WARS* (Andrew Carroll ed., 2010). Recognizing the importance of wartime correspondence, the Smithsonian established an exhibition on correspondence archived from American wars. See *War Letters: Lost and Found*, NAT’L POSTAL MUSEUM, <http://www.postalmuseum.si.edu/warletters/> (last visited Mar. 7, 2013).

correspondence has shifted from letters home to emails home.¹⁸¹ When a soldier is killed, instead of preserving the hard copy of the letter, the only record of the correspondence is contained in the message itself.¹⁸² Thus, allowing for social media and email inheritance would encourage the preservation of a long-valued chronicle of warfare.

VI. THE SCA SHOULD BE REFORMED TO EXEMPT HEIRS, BENEFICIARIES, AND ESTATE FIDUCIARIES

This Part analyzes a proposed revision to the SCA, which exempts heirs, beneficiaries, and estate fiduciaries from coverage under the SCA. First, this Part outlines how heirs, beneficiaries, and estate fiduciaries could be exempted from the SCA. Second, this Part addresses two potential drawbacks to reforming the SCA, involving social media and email provider interests and the rights of decedents to have control over who can access their digital assets after death and shows why these worries are unfounded. Lastly, because an amendment to the SCA is not a cure-all for the digital inheritance problem, only a necessary step in its solution, this Part outlines how the SCA's amendment squares with other proposed solutions that address other aspects of the digital inheritance problem.

A. How Estates Could Be Exempted Under the Stored Communications Act

The SCA has encouraged social media and email providers to create privacy policies that inhibit the transfer of digital assets following the death of the user in order to protect themselves against potential liability under the Act.¹⁸³ Thus, the solution to this dilemma would be to clarify the boundaries of the SCA by creating exceptions for heirs, beneficiaries, and estate fiduciaries. The voluntary disclosure provision of the SCA currently carves out various exceptions under which the Act does not apply.¹⁸⁴ These exceptions fall in line with the concept that the SCA was originally intended to apply to criminal investigations conducted by the federal government.¹⁸⁵ Amending the SCA and

¹⁸¹ Zaslow, *supra* note 15. For more information on the shift of wartime correspondence from letters home to email home, see Keenan, *supra* note 14, at B1.

¹⁸² See Keenan, *supra* note 14. The shift from written to digital correspondence has encouraged organizations like the National Endowment for the Arts and authors such as Tom Clancy to offer soldiers workshops on how to preserve their wartime correspondence. NAT'L ENDOWMENT FOR THE ARTS, OPERATION HOMECOMING: WRITING THE WARTIME EXPERIENCE 2.

¹⁸³ See *supra* Part IV.

¹⁸⁴ 18 U.S.C. §§ 2702(b), 2703(e) (2012); see also Kerr, *supra* note 55, at 1223 (stating that disclosure is only allowed in the case of one of the eight enumerated exceptions).

¹⁸⁵ See S. REP. NO. 99-541, at 2 (1986). Senator Kennedy noted in support of the Wiretap Act that the Act "authorize[s] . . . controlled electronic surveillance . . . for the

clarifying an exception for estates would return the Act to its primary focus on criminal investigations, and would also serve to remove the federal government from estate administration.

B. The Model Act: 18 U.S.C. § 2701

- (c) Exceptions.— Subsection (a) of this section does not apply with respect to conduct authorized—
 - (1) by the person or entity providing a wire or electronic communication service;
 - (2) by a user of that service with respect to a communication of or intended for that user; or
 - (3) in section 2703, 2704 or 2518 of this title.
 - (4) by any heir, beneficiary, or fiduciary of an estate of a deceased user of an electronic computing service or a remote computing service.¹⁸⁶

C. Why Heirs, Beneficiaries, and Estate Fiduciaries Should Be Exempted

The first step in reforming the SCA's role in digital inheritance is to tackle the looming question about who specifically should be excluded under the SCA. Excluding heirs, beneficiaries, and estate fiduciaries from the SCA's coverage would accomplish three purposes. First, exempting heirs, beneficiaries, and estate fiduciaries would ease liability worries for social media and email providers and would thus encourage them to adopt privacy policies for deceased users that are more accommodating to estates. Second, reforming the SCA would remove the federal government's involvement in an area of law that has been traditionally and nearly uniformly relegated to the states. Third, it would return the scope of the Act to criminal investigations and conduct, rather than digital inheritance.

1. Reforming the SCA Would Ease Liability Concerns for Social Media and Email Providers

Reforming the SCA to exempt estate fiduciaries, heirs, and beneficiaries would remove risks of liability for social media and email providers if they were to allow estates access to deceased users' accounts. Thus, reforming the SCA would allow and encourage social media and email providers to create privacy policies that are more accommodating to digital asset transfer.

purpose of investigating specified crimes involving national security and serious offenses." S. REP. NO. 1097, at 214; 1968 U.S.C.C.A.N. 2112, at 2255–56 (additional views of Mr. Kennedy of Massachusetts, Mr. Tydings, Mr. Smathers, and Mr. Fong).

¹⁸⁶ This proposed amendment to the SCA adds one additional exception to the ones already listed in the Act. The first three exceptions are already codified as part of the SCA. See 18 U.S.C. § 2701(c).

Social media providers have stated that one primary problem with the SCA is that it is unclear under which circumstances the Act applies and who is covered under the Act.¹⁸⁷ In terms of digital inheritance, the proposed amendment to the SCA outlines that if a social media or email provider were to disclose account information or content to a legitimate estate beneficiary, heir, or fiduciary, the provider would not be liable under the Act.¹⁸⁸ Correspondingly, providers could relax harsh user policies regarding digital inheritance because their potential threat of liability under the SCA would be relieved.

2. *Reforming the SCA Would Remove the Federal Government from an Area of Law Traditionally Relegated to the States*

Reforming the SCA would remove the federal government from interfering with estate law, which has traditionally been a creature of state law.¹⁸⁹ Each state has a set of laws determining how wealth is transferred from one generation to the next.¹⁹⁰ The federal government, on the other hand, is largely absent from estate law, especially the process of transfer and determining what can be transferred.¹⁹¹ The lack of mention of estates in the United States Code serves as a further signal that the federal government should not interfere with or be involved in estate administration beyond taxation.

Reforming the SCA to force the federal government out of the realm of estate law necessitates the inclusion of an exemption for estate fiduciaries, beneficiaries, and heirs under the SCA's coverage. The goal is to remove the entirety of the SCA as a barrier to digital inheritance. If any single class were to remain covered by the Act, social media providers would still retain some risk of liability under the Act that would necessitate continued strict privacy policies involving digital inheritance.¹⁹² For instance, if estate fiduciaries were solely

¹⁸⁷ See Howitson, *supra* note 66 (stating that he is "itching for that fight" and awaiting a case that defines exactly what content on Facebook is protected so that it's clearer to everyone).

¹⁸⁸ Social media providers would not be absolved of liability under the proposed revision to the Act, though, if they were to grant access to individuals not part of the estate. See *infra* Part VI.D.2.i.

¹⁸⁹ Michael H. Tow, Estate of Love and § 2053(a)(2): *Why State Law Should Control the Determination of Deductible Administration Expenses*, 12 VA. TAX REV. 283, 286 (1992) (noting that "the estate is administered under state law").

¹⁹⁰ JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS: CASES AND MATERIALS 63 (3d ed. 2007) (stating that property of decedents is distributed in accordance with the laws of the jurisdiction where they were domiciled).

¹⁹¹ The federal estate tax is the only mention of estate law in the entire United States Code. See 26 U.S.C. § 2001(a) (2012).

¹⁹² For instance, if only estate fiduciaries were exempted under the SCA, Lance Corporal Ellsworth's parents would still be disallowed from gaining his email's contents, Alison Atkins's parents would continue to be denied access to their daughter's social network accounts, and the families of Jerald Spangenberg and Nathan Vogel would not be

exempted from the SCA's coverage, the federal government still remains a significant barrier to digital inheritance because social media providers would still retain harsh privacy policies to protect themselves against family members accessing accounts without authorization. Accordingly, if only fiduciaries are exempted, the federal government still stands in the way of digital inheritance, in spite of traditional concepts of state law in inheritance.

A similar problem arises if only heirs and beneficiaries are exempted from the SCA's coverage. As previously mentioned, emails can harbor important information regarding a decedent's various accounts, including utility and bank accounts.¹⁹³ If estate fiduciaries are disallowed access to digital accounts, they will continue to face difficulty in discovering and managing these accounts as part of the decedent's estate, which further delays estate administration and closing.¹⁹⁴ Thus, to fully remove the federal barrier in digital inheritance, estate fiduciaries, beneficiaries, and heirs must all be exempted from coverage under the Act.

3. Reforming the SCA Would Return the Act's Scope to Criminal Investigations and Criminal Conduct

The SCA was passed with the intention of regulating federal criminal investigations and criminal conduct.¹⁹⁵ Furthermore, it regulates private actors, preventing them from criminally interfering with electronic communications in digital storage.¹⁹⁶ The SCA was not enacted to control digital inheritance—there is no mention of inheritance in the Act's language,¹⁹⁷ nor in its legislative history.¹⁹⁸ Narrowing the Act to exempt estate heirs, beneficiaries, and fiduciaries from the Act's coverage would correspondingly narrow the Act's coverage, once again limiting its scope to criminal conduct and investigations.

able to access the decedents' accounts to sell off any valuable assets retrieved from their gaming accounts. *See supra* Part II.

¹⁹³ *See supra* Part V.C.; *see also* Martínez-Cabrera, *supra* note 173.

¹⁹⁴ *See* Martínez-Cabrera, *supra* note 173. If estate fiduciaries had been allowed to access the digital estate of Karin Prangle's father-in-law, his business would not have racked up more than \$10,000 in losses because of the inability to close some of the business's accounts, which were digitally stored. *Id.*

¹⁹⁵ S. REP. NO. 1097, at 2255–56 (1968) (additional views of Mr. Kennedy of Massachusetts, Mr. Tydings, Mr. Smathers, and Mr. Fong).

¹⁹⁶ 18 U.S.C. § 2701 (2012); *see also* S. REP. NO. 99-541, at 35 (1986) ("This provision addresses the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public.").

¹⁹⁷ *See* 18 U.S.C. §§ 2701–2712.

¹⁹⁸ *See, e.g.,* S. REP. NO. 99-541, at 2 (1986). On the floor of the Senate, debate centered around the Act's applicability to satellite dishes and worries about the Wiretap Act's inadequate protections for privacy in new technologies, not digital inheritance. *See generally* 132 CONG. REC. S14, 441–04 (daily ed. Oct. 1, 1986) (statement of Sen. Patrick Leahy).

D. Issues and Worries over Reforming the SCA

Despite the advantages of reforming the SCA, such a solution does raise several issues. First, many social media providers worry that such a reformation would infringe on their ability to protect the privacy of their users. Second, some users may not wish to share their digital content with family members. However, each of these concerns is accounted for by current privacy and fiduciary laws and thus, each corresponding interest is protected.

1. *Reforming the SCA Does Not Unnecessarily Inhibit Social Media Providers' Abilities To Control the Use of Their Products*

One potential area of concern involving the amendment to the SCA that excludes heirs, beneficiaries, and estate fiduciaries is the impact that it would have on social media providers. One of the central concerns of social media providers is to protect the privacy of their users.¹⁹⁹ However, requiring disclosure may come at the cost of customer privacy. Due to the common law of privacy and fiduciary duties, though, the privacy of users would not be unduly compromised by such an amendment to the SCA.

a. *Customer Confidence and Privacy*

Social media providers have suggested that easing restrictions for digital inheritance could undermine consumer confidence.²⁰⁰ And there may be some grounds for such a claim. Customer concern for account privacy is well documented.²⁰¹ For instance, Facebook users place great value in the privacy

¹⁹⁹ On its website, Google states that it is "committed to improving your security, protecting your privacy, and building simple tools to give you choice and control." *Policies and Principles*, GOOGLE, <http://www.google.com/intl/en/policies/> (last visited Feb. 19, 2013). Tumblr states that it "takes the private nature of [users' personal] information very seriously." *Privacy Policy*, TUMBLR, <http://www.tumblr.com/policy/en/privacy> (last updated Jan. 27, 2014). FourSquare, a popular social media site that allows users to check-in at locations, states in its privacy policy that it "knows that you take your privacy seriously. We do, too." *Foursquare Labs, Inc. Privacy Policy*, FOURSQUARE (Dec. 11, 2013), <https://foursquare.com/legal/privacy>.

²⁰⁰ For instance, in the case of Alison Atkins, Facebook raised the concern that allowing estates to have access to user accounts could "undermine the fundamental concept of authenticity on Facebook." Fowler, *supra* note 21, at A12.

²⁰¹ See Jared Newman, *Facebook Mulls Privacy Changes, Causes More Outrage*, PCWORLD (Mar. 29, 2010, 3:07 PM), http://www.pcworld.com/article/192816/Facebook_Mulls_Privacy_Changes_Causes_More_Outrage.html. Customer outrage over privacy policy changes are not solely confined to Facebook's audience and customer base. Recently, in 2012, Instagram changed its privacy policy to allow it to use customers' photographs in advertisements, which caused an uproar among its customer base. See Helen A.S. Popkin, *Instagram Responds to Outrage, Tweaks Privacy Policy To Limit Photo Use in Ads*, NBC

policies of Facebook and similar companies and when privacy rules are adapted to unfavorable terms, users are often vocal about their objections.²⁰² Since privacy is a central concern for users, there is an argument to be made that Facebook and similar sites should have greater autonomy over who can access deceased users' profiles.

The argument for privacy falls short, however, when the issue of death is brought to the forefront. The common law of torts has long held that deceased individuals have no interest in privacy.²⁰³ Thus, while social media providers such as Facebook do have concerns about privacy expectations for living individuals²⁰⁴—and these privacy concerns would remain protected by social media privacy policies and the SCA²⁰⁵—there is no privacy interest for deceased individuals that Facebook is in charge of protecting.

Beyond protecting individual privacy after death, social media providers have a legitimate interest in ensuring that user accounts are not used in inappropriate manners after the death of a user. One of the greatest problems presently facing social media providers and the accounts of deceased users is "trolling."²⁰⁶ Several instances have arisen in recent years where internet hackers track down and commandeer the accounts of deceased users.²⁰⁷ This activity can cause extreme emotional distress for friends and families still coping with the unexpected loss of a loved one.²⁰⁸ Facebook and other social

NEWS (Dec. 18, 2012, 5:05 PM), <http://www.nbcnews.com/technology/technolog/instagram-responds-outrage-tweaks-privacy-policy-limit-photo-use-ads-1C7660196>.

²⁰² See Newman, *supra* note 201.

²⁰³ RESTATEMENT (SECOND) OF TORTS § 652I reporter's note, cmt. b (1977) ("There is no action for the invasion of the privacy of one already deceased."). For more information about death and privacy, see Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 790 (2009).

²⁰⁴ Fowler, *supra* note 21.

²⁰⁵ Under the proposed amendment to the SCA, social media and email providers would still be liable if they were to give access to someone other than the estate.

²⁰⁶ Trolls are internet users who intentionally disrupt online communities by posting comments or using accounts that can be upsetting to general users. Mattathias Schwartz, *Inside the World of Online Trolls, Who Use the Internet To Harass, Humiliate and Torment Strangers: Malwebolence*, N.Y. TIMES MAG., Aug. 3, 2008, at A24.

²⁰⁷ In one instance, trolls edited photographs on the Facebook account of Tom Mullaney, a suicide victim, by digitally altering photographs of the boy to include images of nooses and comments including "Hang in there Tom." See Beth Hale, *Tormented by Trolling: The Vile Web Craze That Taunted Family of Bullied Natasha Even After Her Suicide*, U.K. DAILY MAIL (Feb. 26, 2011, 9:10 AM), <http://www.dailymail.co.uk/news/article-1360788/Natasha-MacBryde-suicide-Vile-web-craze-taunted-family-bullied-girl-death.html>.

²⁰⁸ Trolls have become especially prevalent in the age of social media and have gone to the extent of harassing the families of deceased social media users. *Today: Online "Trolls" Terrorize the Grieving* (NBC television broadcast Mar. 31, 2010), available at <http://www.today.com/video/today/36113365#36113365>. For more information on the effects of trolling, see Amy Saunders, *Online Insults Hard To Erase*, COLUMBUS DISPATCH (May 4, 2008, 5:46

media providers have a legitimate interest in preventing trolling and have raised concerns that mandating digital inheritance could hinder social media providers' efforts to detect and suppress the trolling of inactive accounts.²⁰⁹

Although an amendment to the SCA should encourage social media providers to release digital access and content to estates, it does not relieve social media providers of liability if they were to grant access to a party not entitled to have access to the estate, say someone who was not part of the estate.²¹⁰ Thus, under the proposed amendment, social media providers would still need to maintain standards for estates to prove that the account user had indeed died and that the estate was rightfully seeking access to the deceased individual's digital accounts and digital content.²¹¹ Recall that in many instances, estates have been required to obtain a court order requiring the grant of access to accounts and content, as a court order is one of the enumerated exceptions from liability under the SCA.²¹² Even by requiring a stringent process to prove that a user is in fact deceased and that the estate is a proper party to get access, the SCA amendment would still streamline the procedure necessary to gain access. By maintaining, and perhaps strengthening the procedure necessary to allow estates to gain access to accounts, social media providers can prevent trolling while remaining friendlier to digital inheritance.

2. Amending the SCA Would Not Interfere with Decedents' Rights To Control the Disposition of Their Property at Death

One basic premise of estate law is that decedents should be allowed to control what happens to their property when they die.²¹³ Both testacy and

AM), http://www.dispatch.com/content/stories/local/2008/05/04/online_eraser.ART_ART_05-04-08_A1_2CA3U8C.html.

²⁰⁹ *Today*, *supra* note 208. Social media providers are often in the best position to prevent trolling because often, trolls are overseas or disguised by fake names, which makes criminal sanctions difficult. *Id.*

²¹⁰ 18 U.S.C. § 2702(a) (2012). Under the proposed amendment to the SCA, social media and email providers would still be prohibited from voluntarily disclosing account information or content about living users.

²¹¹ *Accessing a Deceased Person's Mail*, *supra* note 91. In addition to specifically identifying the information being sought, Google requires requesters to provide extensive information about themselves and the deceased user in order to seek access to a deceased user's account, including 1) the requester's full name, 2) the requester's email address, 3) the requester's physical mailing address, 4) a copy of the requester's government-issued ID or driver's license, 5) the Gmail address of the deceased user, and 6) the death certificate of the deceased user. *Id.*

²¹² *See* Chambers, *supra* note 16. Yahoo! only complied with the Ellsworth family's request after an Oakland County, Michigan court granted a court order, ordering the release of account content. *Id.* Similarly, Facebook has required court orders for families to gain access to deceased users' accounts. *Rock Center with Brian Williams*, *supra* note 111.

²¹³ Adam J. Hirscho & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 (1992) ("Perhaps oldest is the notion that testators have a natural right to

intestacy laws are built around the concept that property should be distributed in accordance with what the decedent wanted and if it is unknown what the decedent wanted, estate administrators attempt to decide what the decedent would have wanted.²¹⁴ Digital inheritance, theoretically, should follow similar principles. Thus, an amendment to the SCA raises the question of whether allowing an exemption for heirs, beneficiaries, and estate fiduciaries would override this principle.

a. Decedents' Right To Control Who Has Access to Digital Content

The issue of digital inheritance becomes especially complex in terms of the administration of digital content. Digital content is unique because in many instances, decedents may wish for family members, heirs, and beneficiaries to have access to some content, but not others.²¹⁵ For instance, it may be perfectly acceptable for an individual to have wanted her family to have access to her email contacts if she became incapacitated. Thus, family members would be able to inform business partners, friends, clients, and other relatives about the status of the individual. However, the decedent may not have wished for her family to have unrestricted access to her Facebook account and every piece of content that she has compiled within her account since its creation.²¹⁶ Thus, one question raised by amending the SCA is what influence the proposed solution would have on limiting what a decedent can prevent family members from seeing or obtaining.

Digital inheritance is at the intersection of two competing lines of law in the digital inheritance realm. In one corner, deceased individuals are generally thought to have no privacy rights.²¹⁷ In the other corner, estate law generally encourages the concept that decedents should have a right to control the disposition of their property,²¹⁸ and in the context of digital inheritance, this

bequeath. Having created wealth by the sweat of her brow, the testator is naturally free to do with it as she pleases—including passing it along to others.”).

²¹⁴ DOBRIS ET AL., *supra* note 190 (“Many legislators and scholars have concluded that the intestate succession statute should aim to give effect to the probable intent of the decedent.”).

²¹⁵ Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, ROCK CENTER (June 1, 2012, 10:53 AM), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite. Naomi Cahn, Professor of Law at George Washington University, noted, “[A]ccess to online bank account statements, doing online bill paying, those probably we would expect others to be able to take control over. Many of us probably think that once we die, our Facebook accounts should either be memorialized [left up for only friends to see] or deleted entirely.” *Id.*

²¹⁶ See Geoffrey A. Fowler, *When the Most Personal Secrets Get Outed on Facebook*, WALL ST. J., Oct. 13, 2012, at A1; Catherine Saint Louis, *In the Facebook Era, Reminders of Loss After Families Fracture*, N.Y. TIMES, June 15, 2012, at A1.

²¹⁷ RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (1977).

²¹⁸ DOBRIS, *supra* note 190.

implicates rights to access private accounts and information as well. However, these two conflicting lines of law can be reconciled in terms of controlling access to user accounts after death.

i. *Beneficiaries and Heirs*

Controlling access of beneficiaries and heirs can be accomplished and could reconcile the two competing concerns of privacy and control of property after death. For instance, one possible solution rests in the hands of social media providers. Since social media accounts at their heart are software programs, they can be adapted and changed more readily than many products.²¹⁹ As such, social media providers are well positioned to create an account feature that allows users to determine who should have access to their account in the event of their death.²²⁰ Thus, users could determine which individuals, if any, could have access to their accounts. This solution also proves malleable as a particular user could adapt access to individuals for different accounts—perhaps a user will give more access to email and less access to Facebook or Twitter.

ii. *Estate Fiduciaries*

In the case of estate fiduciaries, decedents' concerns about privacy and who can access their accounts is protected by an estate administrator's duty of confidentiality.²²¹ The duty of confidentiality requires fiduciaries not to "reveal information relating to the representation of a client."²²² Since estate fiduciaries, like other fiduciaries, are bound by this requirement, the concerns for the decedent's privacy and wishes after death can be appropriately accommodated while allowing for the efficient administration of his estate via access to content in digital accounts that relates to the decedent's estate.

²¹⁹ Mark Zuckerberg created the initial Facebook website in only a matter of days. See Nicholas Carlson, *At Last—The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010, 4:10 AM), <http://www.businessinsider.com/how-facebook-was-founded-2010-3?op=1>.

²²⁰ For instance, providers like Yahoo! or Facebook could require new customers, when they create the account, to create a list of people who are allowed to access the account upon the death or incapacitation of the user. Existing users could adjust their preferences via options in account privacy settings. See, e.g., *Privacy Settings and Tools*, FACEBOOK, https://www.facebook.com/settings/?tab=privacy&privacy_source=privacy_lite (last visited Jan. 6, 2014).

²²¹ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

²²² *Id.* For further insight into the history of the duty of confidentiality for estate fiduciaries, see Charles M. Bennett, *Frontiers in Ethics: The Estate Lawyer's Duty of Loyalty and Confidentiality to the Fiduciary Client: Examining the Past To Make Wise Choices Now and in the Future*, 33 OHIO N.U. L. REV. 807, 816 (2007).

E. The SCA's Reformation Is a Necessary, but Not Individually Sufficient, Solution to the Digital Inheritance Problem

The SCA's reformation is not the cure-all for digital inheritance. Beyond the federal government's interference with estate law, and because digital inheritance is a very new subset of estate law, the individual state statutes governing digital inheritance vary wildly in scope and depth, and in most states, these statutes do not exist at all. Moreover, there are jurisdictional issues that further complicate the digital inheritance issue due to the fact that often, users are domiciliaries of a state that is different from the one where social media providers are located or incorporated.²²³ Nonetheless, the SCA's reformation is a necessary step in the digital inheritance problem.

1. Lack of State Laws in the Area of Digital Inheritance

State laws, like federal privacy laws, do not appropriately account for digital inheritance.²²⁴ Currently, only seven states have statutes that reference inheriting digital assets.²²⁵ However, these statutes vary greatly on what digital assets apply to the statutes and which parties can gain access to the assets.²²⁶ Thus, since state laws are largely silent on the issue of digital assets, it is unclear how traditional estate laws apply to digital inheritance.

In response to this problem, some scholars have advocated for the adoption of uniform digital inheritance laws.²²⁷ However, the adoption of uniform digital inheritance laws does not remove the federal government's interference in the digital inheritance realm. Thus, although uniform state laws would serve the purpose of improving the efficiency of digital estate administration, state law would remain hindered by the federal government's interference unless the SCA is amended to force the federal government to step out of the way.

2. How Current State Laws Address Digital Inheritance

The overwhelming majority of state estate law does not address digital assets in any form. Currently, only five states have enacted statutes that

²²³ Often, social media users are domiciliaries of a state that is different than the state where social media and email providers are incorporated, which creates choice of law and forum selection issues. See Tyler G. Tarney, *A Call for Legislation To Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 788–89 (2012).

²²⁴ *Id.* at 787 (highlighting the differences between the few states that have addressed the digital inheritance problem).

²²⁵ See *id.* The states that currently have digital inheritance laws are Connecticut, Idaho, Oklahoma, Rhode Island, Indiana, North Carolina, and Virginia. *Id.*; see also S.B. 279, 2013 Sess. (N.C. 2013); H.B. 1752, 2013 Sess. (Va. 2013).

²²⁶ See *infra* Part VI.E.2.

²²⁷ *Annual Meeting of the Committee on Scope and Program*, UNIFORM L. COMM'N (July 8, 2011), <http://www.uniformlaws.org/Shared/Minutes/scope070811mn.pdf>.

specifically provide for access to some aspects of digital estates.²²⁸ Several other states are currently considering bills that would allow estate fiduciaries to have access to a decedent's digital accounts.²²⁹ However, these laws are extremely varied in terms of the scope of access that they provide to estate fiduciaries, heirs, beneficiaries, and family. Some laws only allow estates to access certain types of accounts such as email accounts.²³⁰ Other state laws provide access only to specific classes of people.²³¹ The absence and lack of uniformity of laws about digital estates has been the subject of recent scholarly debate and the Uniform Law Commission has recently taken up the issue.²³²

3. Uniform Laws

Some scholars have advocated for the adoption of a uniform law that would allow for digital inheritance.²³³ The extent of the proposed law and what individuals are encompassed by its scope remains to be seen, as the Uniform Law Commission has only recently addressed the issue.²³⁴ The Commission, which oversees the drafting and implementation of uniform laws,²³⁵ has received several proposals regarding the drafting of a uniform law that would allow for digital inheritance.²³⁶

Acting on calls from scholars, the Uniform Law Commission has worked to create a proposed uniform digital inheritance act, currently under the title Fiduciary Access to Digital Assets Act.²³⁷ The proposed law, under its most

²²⁸ See Tarney, *supra* note 223, at 787.

²²⁹ Massachusetts's law, as proposed, is more in line with Connecticut's law and allows estates only to have access to email. S.R. 2313, 187th Gen. Court (Mass. 2012). Other states that have considered digital estate laws include North Dakota and Maryland. S.B. 29, 2013 Reg. Sess. (Md. 2013); H.B. 1455, 63d Leg. Assemb., 2013 Reg. Sess. (N.D. 2013).

²³⁰ Most states that have addressed digital inheritance have only granted access to email accounts. See R.I. GEN. LAWS § 33-27-3 (2007); see also IND. CODE § 29-1-13-1.1 (2007). Indiana is unique because rather than allowing access to accounts, it grants personal representatives authority to request electronic documents. *Id.* Oklahoma's statute is lauded as the most comprehensive digital inheritance statute currently in effect in the United States because Oklahoma allows executors of estates to "take control of, conduct, continue, or terminate" a deceased account holder's digital accounts. OKLA. STAT. tit. 58, § 269 (2010); see also IDAHO CODE ANN. § 15-5-424 (2011).

²³¹ See CONN. GEN. STAT. § 45a-334a (2005). Connecticut's statute allows for executors and administrators to access email accounts for decedents who were domiciled in Connecticut at the time of death. *Id.* However, Connecticut's statute limits the class of people who can access the decedent's email—family members and heirs are not granted authority under the statute for account access or content. See *id.*

²³² See Fowler, *supra* note 21.

²³³ UNIFORM L. COMM'N, *supra* note 227.

²³⁴ See Fowler, *supra* note 21, at A12.

²³⁵ About the ULC, UNIFORM L. COMM'N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Jan. 13, 2013).

²³⁶ UNIFORM L. COMM'N, *supra* note 227.

²³⁷ FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Draft 2013).

recent draft, grants access to digital estates for four classes of estate fiduciaries.²³⁸ The Act generally provides access to estate fiduciaries in the case of death or incapacity of the account holder,²³⁹ although whether fiduciaries would have access to the account would vary based on what type of fiduciary they are and whether the account holder granted access or not.²⁴⁰

Although a uniform law would contribute to easing the problem of digital inheritance by creating a clearly outlined system for digital inheritance across the United States, the implementation of a uniform probate law allowing for digital inheritance necessitates amending the SCA. In order for fiduciaries to gain access to digital assets under the proposed Fiduciary Access to Digital Assets Act, terms of service for social media providers must allow for fiduciaries to access the account.²⁴¹ However, as previously mentioned, under the SCA, social media providers strictly limit account usage and access to the account holder.²⁴² Thus, even if the Fiduciary Access to Digital Assets Act were to be uniformly adopted by state legislatures as proposed, given SCA influences on providers' terms of service, digital inheritance would still be inhibited. Accordingly, amending the SCA is not the cure-all in the problem of digital inheritance, but it is a necessary step in allowing digital inheritance.

VII. CONCLUSION

The SCA, as it currently stands, stands in the way of timely and expedient estate administration. Reforming the SCA to include beneficiaries, heirs, and estate fiduciaries as enumerated exceptions to the statute would remove the federal government from the realm of estate law, a traditional facet of state law and would return the Act's scope to its original purpose of regulating criminal

²³⁸ The Act lists four types of fiduciaries: agents, conservators, personal representatives, and trustees. *Id.* § 2.

²³⁹ The Act, as proposed, would allow personal representatives to access digital accounts, provided such a use falls in line with the terms of service for each provider. *Id.* § 4.

²⁴⁰ *Id.* § 6.

²⁴¹ The proposed Act states:

Except as a decedent otherwise provided by will or unless otherwise prohibited by a court, and subject to Section 3, a personal representative may: (1) exercise control over digital property of the decedent; (2) to the extent not inconsistent with 18 U.S.C. Section 2702(b)(3), obtain access to the contents of each record controlled by an electronic communication service or a remote computing service sent to or received by the decedent; and (3) obtain other records of the decedent controlled by an electronic communication service or a remote computing service, including a log of the electronic address of each party with whom the decedent communicated.

Id. § 4. The Act provides similar access for trustees, agents, and conservators, limited by terms of service agreements. *Id.* §§ 4–7.

²⁴² See *supra* Part IV. Generally, the SCA has encouraged social media providers to adopt strict privacy policies because there is still substantial uncertainty about how the Act would apply to social media providers. See Howitson, *supra* note 66.

activity. It is important to note, however, that the SCA's amendment is only one aspect of greater estate planning reform—the SCA's amendment is the first and necessary step for allowing digital inheritance, but it is not the total solution. Beyond the SCA, problems with jurisdictional discrepancies and fine points about who should have access to digital assets are still problems that state legislatures must grapple with. However, in order to ensure that estate fiduciaries are able to close out estates and to ensure that families, such as those of Lance Corporal Ellsworth or Alison Atkins, can access the accounts and digital content of their loved ones, the SCA should be amended to encourage a friendlier digital inheritance process.